STATE OF VERMONT BOARD OF MEDICAL PRACTICE

In Re:)	MPC 15-0203	MPC 110-0803
David S. Chase)	MPC 208-1003	MPC 163-0803
)	MPC 148-0803	MPC 126-0803
)	MPC 106-0803	MPC 209-1003
)	MPC 140-0803	MPC 89-0703
)	MPC 122-0803	MPC 90-0703
Respondent)		MPC 87-0703

MEMORANDUM IN OPPOSITION TO RESPONDENT'S THIRD MOTION TO DISMISS SUPERCEDING SPECIFICATION OF CHARGES

The Vermont Board of Medical Practice ("Board") again takes up consideration of the above-captioned cases after expiration of a stay issued by the Board on September 16, 2004. The Board stayed its proceedings pending the outcome of Respondent's federal criminal trial. The federal criminal trial having concluded in December, 2005, the above-captioned cases are once again before the Board.

In response to the renewed proceedings of the Board, Respondent has moved for a third time to dismiss the Superceding Specification of Charges filed by the State. In support of his motion, Respondent variously rehashes issues already addressed by the Board and introduces other matters—a decision by the State's Professional Responsibility Board ("PRB") and events in Respondent's criminal trial—that are not germane to the Board proceedings and are at best distractions. Respondent also argues that hearing on the charges will serve no purpose. Respondent argues that the Board should dismiss the State's charges without

prejudice, with leave for the State to refile if Respondent reapplies for a medical license in Vermont or applies for a license elsewhere.

The Respondent's motion is redundant and without merit. Respondent offers no justification--nor could he--for the reintroduction of issues previously resolved by the Board. Further, the PRB decision and events in Respondent's criminal trial in no way can relieve the Board of its responsibility to hear and decide the State's Superceding Specification of Charges. Finally, Respondent's argument that hearing on the Superceding Specification of Charges would be "pointless" is a self-serving minimization of both the seriousness of the allegations against Respondent and the Board's responsibility to protect the public. The Board must deny the Respondent's third motion to dismiss.

I. THE EVENTS IN RESPONDENT'S CRIMINAL TRIAL CANNOT RELIEVE THE BOARD OF ITS RESPONSIBILITY TO HEAR AND DECIDE THE STATE'S SPECIFICATION OF CHARGES.

Unsupportive of the Respondent's argument to dismiss the Superceding Specification of Charges are events that transpired in Respondent's criminal trial. It is not clear whether Respondent is arguing that the events in the federal trial support dismissal because he has "endured enough" in his view or because he was acquitted. However, whatever the argument, the events of Respondent's criminal trial do not relieve the Board of its responsibility to hear the Superceding Specification of Charges.

Courts in other jurisdictions repeatedly have articulated the reasons the events and result in a criminal trial do not result in dismissal of charges in a

licensing proceeding. For example, in *Lyness v. Commonwealth of Pennsylvania*, State Board of Medicine, 561 A.2d 362 (Pa. Cmnwlth. 1989) (Attached hereto as Attachment A), a physician argued that the doctrine of collateral estoppel precluded a licensing board from imposing discipline because the physician had been acquitted on criminal charges involving the same factual allegations. *Lyness*, 561 A.2d, 368.

In rejecting the physician's argument, the Commonwealth Court of Pennsylvania ruled there is a lack of identity between the issues in the licensing board proceeding and the issues in the criminal case. *Id.*, at 369. To support its ruling, the Court noted that differing standards of proof (beyond a reasonable doubt in the criminal proceeding *vis-à-vis* preponderance of the evidence in the disciplinary proceeding) and the fact that the disciplinary proceeding, unlike the criminal proceeding, did not involve loss of liberty, demonstrated a lack of identity between the disciplinary and criminal proceedings. *Id.* The Court also noted that while the physician's conduct was determined not to have been criminal, that determination did not resolve the issue before the Board as to whether the physician's conduct was <u>unprofessional</u>. The Court stated:

In the present proceedings the Board concerned itself with whether or not Lyness was guilty of immoral or unprofessional conduct. Clearly, he may be guilty of such conduct, and yet not guilty of a criminal offense.

Lyness, 561 A.2d., at 239.

The reasoning of the *Lyness* court supports denying the Respondent's motion.

Though Respondent has not raised specifically the doctrine of collateral estoppel,

Respondent's argument is essentially the same—the Board should simply dismiss

the Superceding Specification of Charges because Respondent was acquitted in the criminal trial. However, the fact that a jury found there was reasonable doubt as to whether Respondent committed fraud does not relieve this Board of its responsibility to determine, by a preponderance of the evidence, if Respondent engaged in unprofessional conduct in the practice of medicine and in his care of patients.

Another case supporting rejection of the Respondent's argument that the result in Respondent's criminal trial requires dismissal of the charges before the Board is *Thangavelu v. Department of Licensing and Regulation*, 386 N.W.2d 584 (Mich. Ct. App., 1986) (Attached hereto as Attachment B). In that case the physician claimed that both collateral estoppel and Double Jeopardy should have prevented the Michigan State Board of Medicine from taking disciplinary action because of his acquittal in a criminal proceeding based on the same factual allegations. *Thangavelu*, 386 N.W., at 587. The hearing officer rejected the physician's argument and the Michigan Court of Appeals affirmed. *Thangavelu*, at 588-89. In affirming the hearing officer's decision, the Michigan Court of Appeals quoted from the hearing officer's decision as follows:

The practice of medicine, in addition to skill and knowledge, requires honesty and integrity of the highest degree, and inherent in the State's power is the right to revoke the license of those who violate the standards it sets. This revocation proceeding is not a second criminal proceeding placing the physician in double jeopardy. Rather, the purpose is to maintain sound, professional standards for the purpose of protecting the public and the standing of the medical profession in the eye of the public.

Thangavelu, 386 N.W.2d, 589 (internal quotations omitted); See also Arthurs v. Board of Registration in Medicine, 418 N.E.2d 1236, 1248 (Mass.1981)(rejecting similar double jeopardy argument and noting that board is mandated to police the medical profession, and to take appropriate action against those members who do not live up to the solemn nature of their public trust)(Attachment C).

As the cases above indicate, this Board is entrusted with protecting the public safety and maintaining the integrity of the medical profession. Further, as the above cases also make clear, The Board cannot and should not abdicate its obligations to the public trust because of events in Respondent's criminal trial.

II. BOARD'S OBLIGATIONS TO PROTECT THE PUBLIC AND MAINTAIN INTEGRITY OF THE MEDICAL PROFESSION PRECLUDE DISMISSAL OF CHARGES--WHETHER WITH OR WITHOUT PREJUDICE.

Respondent self-servingly argues that further proceedings are "pointless" because the public is sufficiently protected. Respondent, through his attorney, inconsistently represents that he will never practice surgery again but at the same time wishes to keep the option of reapplying for his medical license in case Respondent wishes to teach or perform missionary work. Respondent's Memorandum, p. 27, n.6. In the alternative, Respondent suggests that the Board simply dismiss, over the State's objection, the charges, without prejudice. Respondent's argument trivializes both the nature of the allegations against Respondent and the Board's obligations to protect the public and maintain the integrity of the medical profession.

As he has throughout these proceedings, Respondent ignores the serious and profoundly troubling allegations of unprofessional conduct that he faces before the Board of Medical Practice. Those allegations include the following conduct:

- Undue pressure on patients to undergo cataract surgery that was later to be found unnecessary;
- False diagnoses of dense nuclear cortical cataracts;
- False or misleading recording of test results to justify unnecessary surgery;
- Manipulation of test results to justify unnecessary surgery;
- False documentation that second opinions were given to patients;
- Discouraging patients from getting a second opinion;
- Performing visual tests after eyes were dilated to obtain results that would justify unnecessary surgery.

Contrary to the Respondent's assertions, a hearing and decision on these allegations is not "pointless." The nature and breadth of the allegations before the Board are unprecedented. The public and members of the medical profession have to know that, when serious allegations of unprofessional conduct are brought against a physician, the Board is going to fulfill its obligations to the public and the profession and determine if and how unprofessional conduct actually occurred. For the Board to fulfill its obligations "to maintain sound, professional standards for the purpose of protecting the public and the standing of the medical profession in the eye of the

public" (*Thangavelu*, 386 N.W.2d, at 589) is vital to the protection and well-being of the public, patients, and their families.

Respondent's non-binding and self-serving representations as to his future plans in no way resolve the issues of public safety and professional misconduct before the Board and are, instead, the very reasons the Board needs to hear the charges. Respondent asserts that he has "no current plans" (Respondent's Mem., p. 2, emphasis added) to reapply for a license but wants the option of renewing his license in case he decides to teach or do missionary work. Respondent's Mem., p. 27, n.6. Again, Respondent misapprehends and disregards the seriousness of the allegations before the Board. The issue is whether Respondent should have a medical license and any of the privileges attendant to licensure—including the possibility of teaching or missionary work.

Respondent's non-binding assertion that he will not perform surgery or renew his practice is meaningless in light of his clear intent to retain the ability to renew his license should he choose to do so at some time in the future. Once he obtains a license nothing prevents Respondent from reopening his practice and performing surgery. Further, since Respondent clearly believes he has done nothing wrong and the charges will have been dismissed, Respondent will be free to attempt to engage in the same conduct that led to the filing of the instant charges.

Respondent's alternative argument—that the Board dismiss the charges without prejudice for refiling at some future date if the Respondent reapplies in Vermont or elsewhere for a license --is simply not an option the Board can entertain

or rely upon. To hold the charges in limbo for hearing at some unspecified time in the future is an immense disservice to the public and the profession. It is misleading and naïve to assert that the State' could bring the same case in two or three years just as effectively as it can now. The more time that elapses the more impaired the State's case becomes. Witnesses' memories fade over years and witnesses will relocate, lose interest or die as time passes. To leave the protection of both the public and the integrity of the profession to the vagaries of time would be a profound abdication of the Board's responsibilities.

The Board should also consider the precedent that would result from adopting Respondent's proposal of dismissal without prejudice. If the Board were to dismiss the charges without prejudice based solely on the representations made in this case, other physicians facing charges of unprofessional conduct will seek dismissal simply by surrendering their license and indicating that they don't intend, currently, to seek relicensure. Such a result is at odds with the legislative intent that licensing boards retain jurisdiction over charges of unprofessional conduct even when the licensee surrenders a license or allows it to lapse. 3 V.S.A. \$814 (d).

¹ An agency having jurisdiction to conduct proceedings and impose sanctions in connection with conduct of a licensee or former licensee shall not lose jurisdiction if the license is not renewed or is surrendered or otherwise terminated prior to initiation of such proceedings.

III. THE BOARD ALREADY HAS ADDRESSED THE ISSUES OF THE PURPORTED CONDUCT OF THE INVESTIGATOR AND THE ASSISTANT ATTORNEY GENERAL AND RESPONDENT CANNOT PROVIDE A CONVINCING JUSTIFICATION FOR REVISITING THESE ISSUES.

Much of the Respondent's memorandum is devoted to the purported conduct of the investigator and assistant attorney general assigned to these cases. As he did in his first motion to dismiss, Respondent argues that the conduct of the investigator and the assistant attorney general require the board to dismiss the Superceding Specification of Charges. Nowhere does Respondent provide a satisfactory explanation why the Board's previous resolution of these issues is not dispositive.

Respondent's inability to provide a rationale for revisiting these issues is easily explained—there is none, other than as a distraction. The Board provided a remedy to the Respondent in its previous decision on these issues. The Board found that dismissal was not warranted and Respondent cannot offer any argument as to why the Board should now change its decision. Respondent did previously or dos not now cite to any persuasive authority that the conduct of the investigator or the assistant attorney general violated Respondent's due process rights. The Respondent's rehashing of issues previously resolved by the Board as a basis for his third motion to dismiss only serves to delay hearing on these matters.

IV. THE BOARD DOES NOT HAVE STATUTORY AUTHORITY TO DISMISS THE SUPERCEDING SPECIFICATION OF CHARGES.

The Board does not have the authority to dismiss the State's charges. In order for the Board to dismiss the charges, there must be statutory authority for the Board to do so. The rule that has been stated by the Vermont Supreme Court is that "the Board, as an administrative body, 'has only such powers as are expressly conferred by upon it by the Legislature, together with such incidental powers expressly granted or necessarily implied as are necessary to the full exercise of those granted." Perry v. Medical Practice Board, 169 Vt. 399, 403 (1999)(citations omitted). Nowhere in the Board's enabling legislation is the authority to simply dismiss charges once such charges have been concurred in by the assigned investigative committee and filed by the State. Respondent again has failed to give the Board a legal basis to support his request for dismissal of the charges.

Nor can the Respondent argue that the authority to dismiss charges is "necessarily implied" in order to fully exercise the express powers granted. Indeed, imputing to the Board an implied power to dismiss charges of unprofessional conduct without hearing is in direct derogation of the Board's duty to protect the public. See Perry, 169 Vt. at 403 (purpose of the Board's regulation of medical profession is protecting the public). The charges against Respondent are the result of an investigation by a committee of the Board, a determination by the Attorney General's office that there exists a basis for charging unprofessional conduct with a certification by the Board Secretary that such a basis exists. It would not serve the protection of the public if the Board, without holding a public hearing on charges

already made public, could simply dismiss the charges based on nothing more than the bare promise of a practitioner who has been accused of wrongdoing involving falsehood and violation of the trust of his patients.

For all the reasons argued above, the Respondent's third motion to dismiss the Superceding Specification of Charges must be **DENIED.**

Dated at Montpelier, Vermont this 17th day of February, 2006.

WILLIAM SORRELL ATTORNEY GENERAL STATE OF VERMONT BY

Joseph L. Winn

Assistant Attorney General

ATTACHMENT A

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P

Commonwealth Court of Pennsylvania. Samuel S. LYNESS, M.D., Petitioner,

٧.

COMMONWEALTH of Pennsylvania, STATE BOARD OF MEDICINE, Respondent. **961 C.D. 1988**

Argued March 8, 1989. Decided June 29, 1989.

Physician appealed from decision of state Board of Medicine, finding that he committed immoral and unprofessional conduct and revoking his license to practice medicine for five years. The Commonwealth Court, No. 961 C.D. 1988, McGinley, J., held that for purposes of determining whether certain claims against physician should be denied due to laches delays of alleged victims of physician in reporting incident to Board of Medicine could be considered.

Vacated and remanded.

Crumlish, Jr., President Judge dissented and filed opinion, in which Colins, J., joined.

West Headnotes

[1] Health @ 219

198Hk219 Most Cited Cases

(Formerly 299k11.3(4) Physicians and Surgeons)

Prosecutorial and adjudicative functions were not improperly mixed in physician disciplinary proceeding when Board of Medicine, which heard case of alleged immoral and unprofessional conduct on part of physician, also approved prosecutor's recommendation that hearing be held on charges, as prosecutorial

function was separately performed by prosecutor. <u>U.S.C.A. Const.Amend. 14</u>.

[2] Health @ 220

198Hk220 Most Cited Cases

(Formerly 299k11.3(4) **Physicians** and Surgeons)

State Medical **Board** did **not** demonstrate prehearing bias against **physician charged** with immoral and unprofessional conduct when it denied his application for stay of order by hearing examiners suspending his

license and by ordering **physician** to submit a plan for treatment for medical problems. <u>U.S.C.A.</u> Const.Amend. 14.

[3] Health © 103

198Hk103 Most Cited Cases

(Formerly 299k2 Physicians and Surgeons) Disciplinary proceedings against physician were not required to be terminated due to repeal without savings clause of Act in effect at time of alleged violations, as Replacement Act contained provisions similar to those of Act which was repealed. 1 Pa.C.S.A. § 1962; 63 P.S. § § 34.19, 422.42(a)(2), 422.43; § § 26, 421.15(b)(2, 6) (Repealed).

[4] Health \$\infty\$ 103

198Hk103 Most Cited Cases

(Formerly 299k2 Physicians and Surgeons) Disciplinary proceedings against physicians were not required to be terminated due to repeal without savings clause of statute in effect at time when alleged violations took place, even though replacement statute which barred same activities provided for harsher sanctions. 1 Pa.C.S.A. § 1962; 63 P.S. § 34.19, 422.42(a)(2), 422.43; § § 26, 421.15(b)(2, 6) (Repealed).

[5] Health @ 218

198Hk218 Most Cited Cases

(Formerly 299k11.3(3) Physicians and Surgeons)

Board of Medicine was not required to apply "beyond reasonable doubt" standard in finding that a physician had engaged in immoral and unprofessional conduct.

[6] Administrative Law and Procedure 513 15Ak513 Most Cited Cases

[6] Health \$\infty\$ 223(2)

198Hk223(2) Most Cited Cases

(Formerly 299k11.3(4) Physicians and Surgeons)

Board of Medicine was not required to hear oral testimony or hold evidentiary hearing in case of disciplinary action against physician, as he had been given full opportunity to present evidence and legal arguments before hearing examiner. 40 P.S. § 1301.905(a).

[7] Judgment 559

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228k559 Most Cited Cases

Acquittal of physician on criminal charges did not serve as collateral estoppel bar to disciplinary proceedings before **Board** of Medicine involving same charges.

[8] Administrative Law and Procedure 468 15Ak468 Most Cited Cases

[8] Health \$\infty\$ 215

198Hk215 Most Cited Cases

(Formerly 299k11.3(1) Physicians and Surgeons)

In applying equitable doctrine of laches in a physician's disciplinary proceeding, requirement of undue delay may be fulfilled by proving that alleged victims of physician's conduct unjustifiably delayed in reporting incident to Medical Board.

[9] Administrative Law and Procedure 513 15Ak513 Most Cited Cases

[9] Health 223(1)

198Hk223(1) Most Cited Cases

(Formerly 299k11.3(5) Physicians and Surgeons)

Prosecuting attorney in physician disciplinary matter has authority to appeal severity of sanctions imposed by hearing examiner to the Board of Medicine.

**363 *227 Jean B. Green, Donald J. Martin, Norristown, for petitioner.

*228 John F. Alcorn, Counsel, State Bd. of Medicine, Joyce McKeever, Chief Counsel, and Velma A. Boozer, Chief Counsel, Dept. of State, Bureau of Professional & Occupational Affairs, Harrisburg, for respondent.

Before CRUMLISH, Jr., President Judge, and CRAIG, BARRY, COLINS, PALLADINO, McGINLEY and SMITH, JJ.

McGINLEY, Judge.

Samuel S. Lyness, M.D. (Lyness), appeals from a decision of the State Board of Medicine (Board) finding that Lyness committed acts constituting immoral and unprofessional conduct in violation of Section 15(a)(8) of the Medical Practice Act of 1974 (1974 Act) [FN1] and revoking his license to practice medicine. We vacate and remand.

<u>FN1.</u> Act of July 20, 1974, P.L. 551, as amended, formerly 63 P.S. § 421.15(a)(8),

repealed and replaced by Section 41(8) of the Medical Practice Act of 1985 (1985 Act), Act of December 20, 1985, P.L. 457, as amended, 63 P.S. § 422.41(8).

On January 9, 1985 the prosecuting attorney for the Board initiated charges against Lyness by means of an administrative complaint and order to show cause, alleging that Lyness had committed an act of immoral or unprofessional conduct in November. 1984. Lyness filed an answer denving this allegation. The prosecuting attorney filed an amended complaint and order to show cause on February 22, 1985, and a second amended complaint and order to show cause on August 30, 1985. The second amended complaint and order to show cause set forth the same charges as did the original and also charged Lyness with additional acts of misconduct.

**364 Lyness filed an answer and new matter denying the allegations and raising the bar of laches as to Counts II, III, VI, VII and VIII. requested therein that the Board suspend proceedings during the pendency of criminal charges which were based on the same incidents which formed the basis of Counts I and IV. A hearing examiner for the Board heard testimony, but this Court, acting on Lyness' request, agreed to stay the proceedings pending *229 disposition of the criminal charges. After Lyness was acquitted of the criminal charges he filed an amended answer and new matter to the second amended complaint and order to show cause, in which he asserted that he had been acquitted of criminal charges which had been based on the same incidents which were the subject of Counts I and IV. He alleged that the acquittals barred the Board from proceeding on Counts I and IV.

The proceedings before the **Board's** hearing examiner resumed. The hearing examiner issued an Adjudication and Order, finding Lyness guilty of immoral and unprofessional conduct as **charged** in each of Counts I, II, III, VI, VII and VIII, and finding that he had violated Section 15(a)(8) of the 1974 Act. He ordered that Lyness' **license** to practice medicine be suspended for a period of five years, and that he submit to the "care, counselling or treatment of a **physician** or **physicians** designated by the **Board**." [FN2]

<u>FN2.</u> Decision and Order of the Hearing Examiner, June 22, 1987, at 5, 18-19, Reproduced Record (R.R.) at 51a, 64-65a.

(Cite as: 127 Pa.Cmwlth. 225, 561 A.2d 362)

Both Lyness and the prosecuting attorney requested review by the **Board**. Lyness raised several contentions of error, and he requested that the **Board** hold an evidentiary hearing, and permit the filing of briefs and oral argument. The prosecuting attorney requested that the **Board** impose a harsher sentence. The **Board** denied Lyness' request for oral argument and an evidentiary hearing, but did establish a briefing schedule. The **Board** vacated the order of the hearing examiner, granted the prosecutor's request, and revoked Lyness' **license**.

Lyness raises the following contentions of error: 1) the **Board** commingled its prosecutorial and adjudicatory functions; 2) the proceedings were terminated by the repeal without savings clause of the 1974 Act; 3) the proceedings as to Counts II, III, IV, VI, VII and VIII were barred by application of laches; 4) the Board failed to apply the "beyond a reasonable doubt" standard; 5) the board erroneously denied oral argument and a new hearing; 6) the acquittal of the criminal charges estopped the Board from *230 proceeding as to Count I; and 7) the modification of penalty was improper.

Our scope of review is limited to a determination of whether constitutional rights were violated, and whether the decision is in accordance with law and supported by substantial evidence. <u>Cassella v. State Board of Medicine</u>, 119 Pa.Commonwealth Ct. 394, 547 A.2d 506 (1988).

[1] We first address Lyness' contention that the procedure which the Board followed violated due process. He specifically claims that the Board improperly commingled its prosecutorial and adjudicatory functions by permitting Board members, who voted to issue the complaint against him and to proceed to formal hearing, to serve on the tribunal which adjudicated those same charges.

The Board followed its standard operating procedure in prosecuting and adjudicating this matter. [FN3] A complaint was submitted to the Complaints Officer for the Bureau of Professional and Occupational Affairs. The complaint was then transmitted to a Board prosecutor, who conducted an investigation. The prosecutor recommended that a complaint be issued and a formal hearing be held, and the Board voted to accept the recommendation. The prosecutor then prepared an administrative complaint and order to show cause.

<u>FN3.</u> The complaint process of the Board as it operated during the period relevant to

these proceedings was set forth at $\underline{49}$ Pa.Code § 17.252, and is recodified at $\underline{49}$ Pa.Code § 16.62.

**365 This Court upheld the constitutionality of a similar procedure in <u>Oppenheim v. Department of State</u>, <u>Bureau of Professional and Occupational Affairs</u>, <u>State Dental Council and Examining Board</u>, 74 Pa.Commonwealth Ct. 200, 459 A.2d 1308 (1983). Lyness suggests, however, that our decision in <u>Oppenheim</u> failed to follow the principles as set forth by our Supreme Court in <u>Dussia v. Barger</u>, 466 Pa. 152, 351 A.2d 667 (1975). Lyness also contends that the presence of actual bias distinguishes this controversy from <u>Oppenheim</u>.

*231 We reject Lyness' contention that our decision in <u>Oppenheim</u> misapplied the <u>Dussia</u> standard. In <u>Oppenheim</u>, as here, the appellant relied on <u>Dussia</u> to support his claim that his due process rights were violated. We dismissed that claim after a review of the pertinent authority from the United States Supreme Court, as well as our own Supreme Court, stating that:

[O]ur court has recognized a fundamental distinction between the danger of conjoining prosecutorial and adjudicative functions in a single individual, and the danger of commingling such functions in an administrative structure statutorily designed. Thus, as a general rule, a decision made by a tribunal after a formal adversarial hearing, where that tribunal has generally supervised an investigation into the same matter previously, or made a prehearing determination of probable cause is not per se an adjudication rendered by a biased tribunal, as long as the prosecutorial and investigatory aspects of the matter are adequately separated from the adjudicatory function ... In such cases, a party claiming due process violations must show actual bias....

The <u>Dussia</u> standard applies only when a single individual commingles prosecutorial and judicial functions; in such cases, the mere appearance of possible prejudice renders the adjudication unconstitutional.

Oppenheim, 74 Pa.Commonwealth Ct. at 214-15, 459 A.2d at 1316 (citations omitted and emphasis added).

In <u>Scalzi v. Citv of Altoona</u>, 111 Pa.Commonwealth Ct. 479, 533 A.2d 1150 (1987), we had occasion to review both <u>Dussia</u> and <u>Gardner v. Repaskv</u>, 434 Pa. 126, 252 A.2d 704 (1969). We noted that each of these cases involved a review of the role of a single individual. Thus, Lyness' reliance on <u>Dussia</u> and

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Gardner is unfounded.

[2] For Lyness to prevail he must show actual bias. Lyness points to two actions of the Board which he contends demonstrate bias: 1) the Board denied Lyness' application for stay of the order of the Hearing Examiner suspending his license; and 2) the Board ordered Lyness to *232 submit a plan for treatment. Lyness contends that the denial of his application for stay indicates that the Board had already determined that he was unlikely to prevail on the merits. He further contends that the Board's order that he submit a plan for treatment reflected the Board's predetermination of Lyness' guilt.

We disagree. A determination of whether or not the applicant is likely to prevail on the merits is only one of the criteria to be considered relative to an application for a stay. Other factors must be weighed, too, such as whether the applicant will suffer irreparable injury if the stay is denied; whether the issuance of a stay will substantially harm other interested parties; and whether the issuance of a stay will adversely affect the public interest. Pennsylvania Public Utility Commission v. Process Gas Consumers Group, 502 Pa. 545, 467 A.2d 805 (1983). The Board concluded that Lyness did not satisfy these criteria. [FN4] Lyness has made no showing that the Board committed an error of law or an abuse of discretion in denying his application for a stay, or that any such error of law or abuse of discretion was premised on bias. Nor has he shown that the Board's order requiring him to submit a treatment plan is an indication of bias. denied Lyness' application for stay, it was incumbent upon the Board to take action to put into effect the Hearing Examiner's **366 order, including the provision which required Lyness to undergo treatment. [FN5]

<u>FN4.</u> Board's order, July 29, 1987, R.R. at 78a.

<u>FN5.</u> Board's order September 23, 1987, R.R. at 83a.

[3][4] We next address Lyness' contention that the proceedings against him should have been terminated due to the repeal without a savings clause of the 1974 Act, which had been in effect at the time of the alleged violations, and pursuant to which the proceedings against him were commenced. Lyness maintains that the inclusion in the 1985 Act of harsher penalties than were permitted in the 1974 Act [FN6] constitutes a substantial difference between the

1974 *233 and 1985 Acts, such that the proceedings against him must be terminated.

FN6. Section 15(b)(2) of the 1974 Act, formerly 63 P.S. § 421.15(b)(2) permitted the Board to impose a private or a public reprimand. Section 42(a)(2) of the 1985 Act, 63 P.S. 422.42(a)(2) permits only a public reprimand. Under Section 15(b)(6) of the 1974 Act, formerly 63 P.S. § 421.15(b)(6), the Board was authorized to restore or reissue a license, even a revoked license. Under Section 43 of the 1985 Act, 63 P.S. § 422.43, the Board is prohibited from restoring a revoked license and prohibits reapplication by the licensee for five years.

Our decision in <u>Gangewere v. Pennsylvania State Architects Licensure Board</u>, 98 Pa.Commonwealth Ct. 613, 512 A.2d 1301 (1986) negates Lyness' argument. In that case we addressed a similar issue, that being whether the Pennsylvania State Architects Licensure Board (Architects Board) erred in suspending the petitioner's license pursuant to Section 11 of the Architects Law <u>[FN7]</u> when that law was replaced and repealed by the Architects Licensure Law prior to the issuance of the citation against him.

FN7. Act of July 12, 1919, P.L. 933, as amended, formerly 63 P.S. § 26, repealed and replaced by Section 19 of the Architects Licensure Law, Act of December 14, 1982, P.L. 1227, as amended, 63 P.S. § 34.19.

Our analysis therein was guided by <u>Section 1962</u> of the Statutory Construction Act, <u>1 Pa. C.S. § 1962</u>, and our Supreme Court's decision in <u>In re Dandridge</u>, 462 Pa. 67, 337 A.2d 885 (1975). <u>Section 1962</u> of the Statutory Construction Act states as follows:

Whenever a statute is repealed and its provisions are at the same time reenacted in the same or substantially the same terms by the repealing statute, the earlier statute shall be construed as continued in active operation. All rights and liabilities incurred under such earlier statute are preserved and may be enforced.

In <u>Gangewere</u> we compared the prohibited conduct and penalty provisions in both the Architect's Law and the Architects Licensure Law and we determined that there was a substantial identity between the conduct which was proscribed by each statute and the penalty provisions which were contained in each

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statute. The similarity of these provisions led us to conclude that the Architect's Board had authority to sanction the petitioner for conduct which occurred when the former law was in effect because the *234 standard proscribing the conduct was "carried forward without interruption by the later enactment." *Gangewere*, 98 Pa.Commonwealth Ct. at 619, 512 A.2d at 1305. This analysis followed the Supreme Court's reasoning in *In re Dandridge*, in which the Supreme Court applied Section 1962 of the Statutory Construction Act. The Court stated that:

[E]ven though a statute is repealed, if some or all of its provisions are reenacted so that the conduct prohibited in the first statute remains censured by the reenactment, there is nothing which interferes with the power of the State to prosecute the matter without interruption.

Dandridge, 462 Pa. at 74, 337 A.2d at 889.

We reach a similar conclusion. Lyness concedes that there is a similarity between the conduct which he was accused of committing in violation of the 1974 Act and the conduct which is proscribed under the 1985 Act. Section 15(a)(8) of the 1974 Act, formerly 63 P.S. § 421.15(a)(8) provided that:

(a) The Board shall have authority to refuse, revoke or suspend the license of a **367 physician for any or all the following reasons:

(8) Being guilty of immoral or unprofessional conduct. Unprofessional conduct shall include any departure from, or failure to conform to, the standards of acceptable and prevailing medical practice, in which proceeding actual injury to a patient need not be established.

Section 41(8) of the 1985 Act, <u>63 P.S.</u> § <u>422.41(8)</u>, states that:

The Board shall have the authority to impose disciplinary or corrective measures on a Board-regulated practitioner for all of the following reasons:

(8) Being guilty of immoral or unprofessional conduct. Unprofessional conduct shall include departure from or failing to conform to an ethical or quality standard of the *235 profession. In proceedings based on this paragraph, actual injury to a patient need not be established.

Lyness points out, however, that the penalties in the 1985 Act are harsher than the penalties which were contained in the 1974 Act. Thus, he argues that due to the disparity in the severity of the penalties, the

1985 Act may not be considered a substantial reenactment of the 1974 Act. He contends that the primary distinction is between the Board's discretion under the 1974 Act to restore or reissue any license at any time <u>[FN8]</u>, and the five year ban on reinstatement of a revoked license under the 1985 Act. <u>[FN9]</u>

<u>FN8.</u> Section 15(b)(6) of the 1974 Act, formerly 63 P.S. § 421.15(b)(6).

<u>FN9.</u> Section 43 of the 1985 Act, <u>63 P.S.</u> § <u>422.43</u>.

A similar disparity existed in Gangewere between the penalty provisions of the Architects Law and the Architects Licensure Law. In the Architects Law the Architects Board had discretion to restore or renew any license at any time _[FN10], whereas the Architects Licensure Law prohibited reinstatement of a revoked license for five years. [FN11] difference in the penalty provisions was not a controlling factor. We focused instead on the fact that the petitioner's conduct would be grounds for revocation or suspension of his license under both Applying this reasoning to the instant matter, we conclude that the repeal of the 1974 Act by the 1985 Act did not terminate the Board's authority to proceed against Lyness pursuant to the 1974 Act.

FN10. Section 11 of the Architects Law, formerly 63 P.S. § 26.

FN11. Section 19(c) of the Architects Licensure Law, 63 P.S. § 34.19(c).

- [5] Lyness next contends that the Board erred by failing to apply the "beyond a reasonable doubt" standard. None of the cases on which he relies have established this standard of review for disciplinary proceedings before licensing boards.
- [6] Lyness also maintains that the Board violated his due process rights by refusing to hear oral argument and by refusing to hold an evidentiary hearing. The decision concerning whether or not to hear oral testimony or to hold *236 an evidentiary hearing rests within the discretion of the Board. [FN12] In Herberg v. State Board of Medical Education and Licensure, 65 Pa. Commonwealth Ct. 358, 442 A.2d 411 (1982), this Court held that the Board did not abuse its discretion in failing to admit additional testimony where the record revealed that the petitioner was given a full opportunity to present

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evidence and legal arguments before the hearing examiner. The record in the matter presently before this Court reflects that Lyness was given a similar opportunity before the Hearing Examiner, **368 and he makes no allegations to the contrary. The record of the matter was sufficiently complete for the **Board** to conduct a proper review. The **Board** did **not** abuse its discretion in refusing to hear oral argument or additional evidence.

<u>FN12.</u> See Section 905 of the 1974 Act, <u>40</u> <u>P.S. § 1301.905(a)</u>:

If application for review is made to the State **Board** of Medical Education and Licensure ...the State **Board** of Medical Education and Licensure ... shall review the evidence, and if deemed advisable by the board, hear argument and additional evidence. (Emphasis added.)

See also 49 Pa.Code § 16.81(a):

The **Board** will review the evidence and, if it deems it advisable, may hear additional testimony from persons already deposed or from new witnesses and arguments of counsel to make a **Board** decision. (Emphasis added.)

[7] Lyness next contends that his acquittal of criminal charges collaterally estopped the Board from imposing discipline with respect to Count I. Lyness cites two cases in support of this proposition, Commonwealth v. Brown, 503 Pa. 514, 469 A.2d 1371 (1983), and Boswell v. Pennsylvania Board of Probation and Parole, 98 Pa.Commonwealth Ct. 386, 512 A.2d 66 (1986). These cases held that collateral estoppel barred the Pennsylvania Board of Probation and Parole from revoking probation or recommitting a parolee, respectively, as a result of conduct which had been basis of a criminal charge, where the individual was acquitted of the criminal charge. The present case is distinguishable from those two cases.

In <u>Brown</u>, the Supreme Court held that an **acquittal** on an underlying **criminal** offense will bar a finding of a probation *237 violation based on conduct that was the subject of the **criminal** prosecution where there is an identity of the issues. The Court reached this decision despite the different standards of proof in the two matters (*i.e.*, "beyond a reasonable doubt" and "preponderance of the evidence"). In <u>Boswell</u> we extended the <u>Brown</u> ruling to parole violations. [FN13] In <u>Boswell</u> we explained the distinction made in <u>Brown</u> between the application of collateral estoppel, due to a criminal acquittal, in probation

hearings, and its non-application in other civil proceedings. We stated:

FN13. In Wallace v. Pennsylvania Board of Probation and Parole, 119
Pa.Commonwealth Ct. 508, 548 A.2d 1291
(1988), we noted that the extension of Brown to the parole revocation proceedings in Boswell was limited to that factual situation:

In Hawkins v. Pennsylvania Board of Probation and Parole, Pa.Commonwealth Ct. 547, 490 A.2d 942 (1985), we held that the principle of collateral estoppel as set forth Commonwealth v. Brown, 503 Pa. 514, 469 A.2d 1371 (1983), does not apply to Board revocation proceedings, since the technical conditions of parole cover a wider range of conduct than the related provisions of the Crimes Code. Consequently, it is permissible to recommit a parolee as a technical parole violator for conduct that was also the subject of criminal prosecution where the parolee was acquitted if there is no identity of the issues. Hawkins. The only exception so far to this rule is where a parolee's only defense at the criminal trial is alibi and he or she is acquitted. There, a parolee cannot be recommitted as a technical parole violator for conduct which was the subject of the criminal charges because the fact finder would have had to find that he was not present at the crime scene. Boswell v. Pennsylvania Board of Probation and Parole, 98 Pa.Commonwealth Ct. 386, 512 A.2d 66 (1986).

Wallace, 119 Pa.Commonwealth Ct. at 512-13, 548 A.2d at 1294.

Notoriously--and properly--absent from our prior distinguishing [between the application of collateral estoppel in probation violation hearings and its non-application in parole violation hearings], however, is the obvious fact that the burden of proof required of the Commonwealth is markedly different in the criminal context and that of probation/parole revocation. In the former realm, proof of commission of the crime must be established beyond a reasonable doubt, while in the latter proof of a violation need only be supported by a preponderance of the evidence.... In Brown the Supreme Court "reject[ed] the suggestion that the difference in burden of proof is *238 conclusive upon the question" of the application of

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collateral estoppel. 503 Pa. at 523, 469 A.2d at 1373-74. Although articulated in the context of probation, we find this rejection to necessarily embrace the lesser burden of proof demand in the realm of parole.

That this was in fact the intent of our Supreme Court is most evident in Brown, in which it is acknowledged that as persuasive a tribunal as the United States Supreme Court has held that "after [a criminal trial] acquittal collateral estoppel does not bar a subsequent civil action using a preponderance standard of proof." 503 Pa. at 520, 469 A.2d at 1374 (referring to **369One Lot Emerald Cut Stones and One Ring v. United States, 409 U.S. 232 [93 S.Ct. 489, 34 L.Ed.2d 438] (1972)). The Brown Court continued on, however, to declare that "[i]t is ... questionable whether the Supreme Court would reach the same conclusion where the subsequent proceeding is not a civil case, but rather a parole revocation matter involving a loss of liberty." 503 Pa. at 521, 469 A.2d at 1374 (emphasis added).

Indeed, it may be fairly well discerned from Brown that the concern with an individual's deprivation of liberty, inherent in revocation of parole, is to prevail over the traditional prejudice against applying collateral estoppel in a later proceeding in which the burden of proof is of a lesser degree. This is evidenced in the quoted material in the foregoing paragraph, but is also discernible in the Court's rejection of the Commonwealth's argument that collateral estoppel should not apply in the probation context because the purposes sought to be achieved in that realm and at the criminal trial are different:

Closer scrutiny of this argument reveals its weakness. In both proceedings the sanction of loss of liberty is involved.

* * *

Most important is that it must be remembered parole and probation as well as the criminal trial fall under the penumbra of the criminal justice system.... [T]o suggest *239 that the policies of one ... seek a purpose inimical to the policies of the others misconstrues the relationship of the various components among themselves.

<u>Boswell</u>, 98 Pa.Commonwealth Ct. at 390-91, n. 4, A.2d 512 at 68, n. 4 (citing <u>Brown</u>, 503 Pa. at 526, 469 A.2d at 1376-77) (emphasis in original).

Clearly, <u>Brown</u> and <u>Boswell</u> do **not** support the application of collateral estoppel, following an **acquittal** on **criminal charges**, in a disciplinary proceeding before a **licensing board**. First, the

differing standards of proof, i.e., the "beyond a reasonable doubt" standard in the criminal proceedings versus the "preponderance of the evidence" standard in the licensing board proceedings, prevents an identity of the issues. Whereas the difference in the standards of proof did not foreclose the application of collateral estoppel in Brown and Boswell, the same constraints are not present in this matter. The licensing board proceedings do not involve the possibility of a loss of liberty; neither do they fall under the "penumbra of the criminal justice system." Thus, we may consider the different standards of proof in determining whether there is an identity of the issues to be decided in the criminal trial and the disciplinary proceedings. The different standards of proof do cause a lack of identity of the issues.

There is a second reason why there is **not** an identity of the issues. In the present proceedings, the **Board** concerned itself with whether or **not** Lyness was guilty of immoral or unprofessional conduct. Clearly, he may be guilty of such conduct, and yet **not** be guilty of a **criminal** offense. Accordingly, we reject the notion that Lyness' **acquittal** of the **criminal charge** should bar these proceedings.

[8] Lyness next contends that the **Board** is estopped from proceeding on Counts II, III, IV, VI, VII, and VIII. He claims that the passage of time prevented him from defending himself against these **charges**, based on lack of witnesses, and memory lapses. With respect to these counts, the victims did **not** report these incidents to the *240 Board until several years after they allegedly occurred, and only after they had learned of the incident which formed the basis of the first count. **Board's** Brief at 23.

In <u>Weinberg v. State Board of Examiners of Public Accountants</u>, 509 Pa. 143, 501 A.2d 239 (1985) the Supreme Court held that the equitable doctrine of laches can be asserted against the Commonwealth in a disciplinary proceeding before a **licensing board**, although the Court stated that: "[T]he courts will be generally reluctant to apply the doctrine against the government and will require a stronger showing by a defendant who attempts to apply the doctrine against the Commonwealth than by **370 one who would apply it against an individual." <u>Id. at 150, 501 A.2d</u> at 243.

The Court set forth the elements of this defense as follows:

Thus, it is clear that the application of the defense of laches requires not only an unjustified delay, but 561 A.2d 362 127 Pa.Cmwlth. 225, 561 A.2d 362

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also that the opposing party's position or rights be prejudiced as a result of that delay.... Moreover, [t]he question of laches is factual and is determined by examining circumstances of each case.

<u>Id.</u> at 148, 501 A.2d at 242. The Court further stated that "the defense of laches is an affirmative defense and the burden of proving laches is, therefore, on the defendant/respondent." <u>Id.</u>

Although the complaints against Lyness were initiated by his alleged victims, the disciplinary action itself was commenced by the Board. Lyness does not allege that the Board lacked due diligence in commencing the disciplinary proceedings. Instead, he contends that the proceedings should be barred due to the lack of due diligence exhibited by all but one of the alleged victims who failed to report the incidents to the Board until years after they were alleged to have occurred. [FN14] Lyness contends that because the purpose of laches is to prevent injustice and to discourage the *241 bringing of stale claims, it is sufficient for him to prove unreasonable delay on the part of the complainants, and he does not need to prove that the Board itself was guilty of a lack of due diligence.

<u>FN14.</u> The conduct complained of in the oldest complaint occurred in 1976, nine years earlier. Other incidents were alleged to have occurred in 1976, 1978, 1979, 1980, and 1981.

Lyness relies upon the case of Appeal of Plantier, 126 N.H. 500, 494 A.2d 270 (1985), in support of his claim that the undue delay need not be attributable to the Board. In that case two complainants alleged that a physician had committed acts of sexual abuse, one act allegedly having occurred nine years earlier, and the other act allegedly having occurred four years earlier. The Court held that the nine year old charge was stale, finding both unjust delay on the part of the complainant in reporting the charge and prejudice to the physician due to his inability to recall the incident. Because the lower tribunal had considered both charges at the same time, the Court reversed and remanded for a separate hearing on the four year old charge.

This issue concerning whether the requisite lack of due diligence must be attributable to the Board or whether it may be attributable to a non-Commonwealth party is a matter of first impression in this Commonwealth. The Supreme Court in Weinberg did not address this specific issue, although the Court referred to the need of the complaining

party to exercise due diligence in instituting his cause of action:

The application of the equitable doctrine of laches does not depend upon the fact that a definite time has elapsed since the cause of action accrued, but whether, under the circumstances of the particular case, the complaining party is guilty of want of due diligence in failing to institute his action to another's prejudice.

ld. at 148, 501 A.2d at 242. (Emphasis added.)

We are persuaded that in applying the equitable doctrine of laches in a disciplinary proceeding, the requirement of undue delay may be fulfilled by proving that a victim unjustifiably delayed in reporting an incident to the Board. Equity requires such a result. An accused may be as prejudiced by a delay which is attributable to an alleged *242 victim as by a delay which is attributable to the Board. Were we to decide this issue elsewise there would be no limitation to the length of time between the occurrence of an alleged violation of a professional licensing act and the commencement of disciplinary proceedings. [FN15]

FN15. We note that there are limitations with respect to the time within which civil actions and criminal proceedings may be commenced. See generally, Sections 5501-5536 of the Judicial Code, 42 Pa.C.S. § \$5501-5536, and Sections 5552-5554 of the Judicial Code, 42 Pa.C.S. § \$5552-5554. See also Commonwealth v. Arnold, 331 Pa.Superior Ct. 345, 480 A.2d 1066 (1984) (discussing the weighing of reasonable delay against prejudice to the defendant in criminal cases where the statute of limitations does not provide the necessary protection.)

**371 We have thus determined that laches may bar these proceedings if Lyness proved that he was prejudiced by the undue delay of his alleged victims in reporting the incidents to the Board. As the Court in <u>Weinberg</u> declared, "the question of laches is factual and is determined by examining circumstances of each case." <u>Id. at 148, 501 A.2d at 242</u>. It is not this Court's role, but rather it is the role of the Board as fact finder, to determine whether Lyness proved that the alleged victims unreasonably delayed in filing their complaints, and whether he was prejudiced by any such delay. The Board did not make these factual determinations; thus, we must remand in order to give the Board an opportunity to do so.

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(Cite as: 12/ Fa.Ciiiwitii. 225, 301 A.2u 302)

[9] The final two issues which Lyness raises address the modification of the penalty which was originally imposed by the hearing examiner. Lyness maintains that the prosecuting attorney did not have authority to appeal to the Board for a review of the hearing examiner's decision. We recently held in <u>Cassella</u>, 119 Pa.Commonwealth Ct. at 404-07, 547 A.2d at 511, that such an appeal is proper.

Lyness also contends that the penalty provisions in the 1985 Act are harsher than the penalty provisions in the 1974 Act, and that, because of the greater severity of punishment, the 1985 Act is an unconstitutional ex post facto law. Due to our decision above to remand this matter, we will not address this last contention. The Board indicated in its *243 decision that the number of violations was a major factor in its decision to revoke, instead of to suspend, Lyness' license. [FN16] Thus, should the Board dismiss some of the counts due to laches, such dismissal may effect a change in the penalty which the Board imposes. [FN17]

FN16. The Board stated:

Petitioner in mitigation has presented evidence of his surgical skill and of his good character, however, this mitigation is outweighed by violations so serious. The number of incidents seriously troubles the Board. The Board cannot accept the practice of medicine within the Commonwealth by Petitioner. Protection of the public must be the Board's overriding concern.

Decision of the Board, June 22, 1987 at 36-37.

FN17. The Hearing Examiner enumerated the counts at which he found Lyness to be guilty of immoral and unprofessional conduct. Decision of the Hearing Examiner, June 22, 1987, at 5, R.R. at 51a. The Board, however, did not review each count on its own merits, although it did separately assess the credibility of each Instead the Board found complainant. "particularly persuasive the similarities of the occurrences, each of which tends to corroborate the other." Decision and order of the Board, March 22, 1988, at 35. The witnesses should not be viewed as corroborative of the others, and the Board should consider each count separately. Proof that a person has done an act on one

occasion is not probative of the contention that he did a similar act upon another occasion. Roney v. Clearfield County Grange Mut. Fire Ins. Co., 332 Pa. 447, 3 A.2d 365 (1939); L. Packel & A. Poulin, Pennsylvania Evidence § 405.3, at 181-82 (1987). The Board should identify the separate counts at which it finds Lyness to be guilty of immoral and unprofessional conduct.

For the reasons stated above we vacate the decision of the Board and remand this matter to the Board for proceedings consistent with this opinion.

DOYLE, J., did not participate in the decision in this case

ORDER

AND NOW, this 29th day of June, 1989, the decision of the State Board of Medicine is vacated, and this case is remanded for proceedings consistent with the within opinion. Jurisdiction is relinquished.

CRUMLISH, Jr., President Judge.

I respectfully dissent.

*244 As the majority notes, "[t]he Board followed its standard operating procedure in prosecuting and adjudicating this matter." (Footnote omitted). The majority also notes that the Board not only made the initial decision to issue a complaint against Lyness, but ultimately adjudicated that complaint by ordering, without an evidentiary hearing or oral argument, a harsher sanction than that imposed by the hearing examiner. Such involvement constitutes an impermissible commingling of prosecutorial **372 and adjudicatory functions under <u>Dussia v. Barger</u>, 466 Pa. 152, 351 A.2d 667 (1975).

Thus, for the reasons more fully explained in my dissent in *Brutevn Appeal*, 32 Pa.Commonwealth Ct. 541, 380 A.2d 497 (1977), I would reverse.

COLINS, J., joins in this dissent.

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END OF DOCUMENT

ATTACHMENT B

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Court of Appeals of Michigan. Chelliah THANGAVELU, M.D., Petitioner-Appellant,

٧.

DEPARTMENT OF LICENSING AND REGULATION, State **Board** of Medicine,

Respondent-Appellee.

Docket No. 82495.

Submitted Jan. 8, 1986.
Decided March 3, 1986.
Released for Publication May 20, 1986.
Leave to Appeal Denied May 28, 1986.

Doctor's license to practice medicine was revoked by the State Board of Medicine and Department of Licensing and Regulation. The Circuit Court, Wayne County, Marriane O. Battani, J., affirmed, and doctor appealed. The Court of Appeals, Beasley, J., held that: (1) hearing officer's decision not to admit results of complainant's polygraph test, indicating that she was lying when she said doctor sexually abused her, was not abuse of discretion, and (2) doctrine of collateral estoppel did not apply, though doctor had previously been acquitted of same criminal charge upon which revocation was based.

Affirmed.

West Headnotes

[1] Licenses 🗪 38

238k38 Most Cited Cases

Applicable appellate standard to be applied in reviewing findings of fact made by hearing officer in license revocation proceeding is whether findings are supported by competent, material and substantial evidence on record as whole.

[2] Health @ 218

198Hk218 Most Cited Cases

(Formerly 299k11.3(3) **Physicians** and Surgeons)

Finding of **licensing board**, that doctor had engaged in unprofessional conduct and that his **license** should be revoked, was supported by testimony of two female patients as to doctor's alleged sexual abuse.

[3] Health \$\infty\$=218

198Hk218 Most Cited Cases

(Formerly 299k11.3(3) **Physicians** and Surgeons)

Hearing officer's decision in license revocation proceeding, **not** to admit results of complainant's polygraph test indicating that she was lying when she said doctor sexually abused her, was **not** abuse of discretion.

[4] Health 218

198Hk218 Most Cited Cases

(Formerly 299k11.3(3) **Physicians** and Surgeons)

Results of polygraph test, indicating that one of women who **charged** doctor with sexual abuse was **not** telling truth, was **not** conclusive on question of whether said abuse occurred in proceeding to revoke doctor's **license**.

[5] Double Jeopardy 24

135Hk24 Most Cited Cases

(Formerly 110k163)

Doctor was **not** placed in double jeopardy as result of hearing officer's refusal, in **license** revocation proceeding arising out of patient's **charges** of sexual abuse, to give collateral estoppel effect to judgment of **acquittal** in **criminal** prosecution arising out of same **charges**.

[6] Health @ 207

198Hk207 Most Cited Cases

(Formerly 299k11.3(4) **Physicians** and Surgeons)

[6] Health © 222(3)

198Hk222(3) Most Cited Cases

(Formerly 299k11.3(4) **Physicians** and Surgeons)

Doctrine of collateral estoppel did **not** apply to a revocation of **license** proceeding, though doctor had been **acquitted** of same **criminal charge** upon which the revocation was based, as standard of proof in **license** revocation proceeding was by mere preponderance of evidence, and as purpose of revocation proceeding substantially differed from that of **criminal** prosecution.

[7] Health 223(1)

198Hk223(1) Most Cited Cases

(Formerly 299k11.3(4) **Physicians** and Surgeons)

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Record in **license** revocation proceeding adequately indicated that majority of members of **licensing board** read administrative record as required by statute, where final order of **board** stated that **board** reviewed record made in administrative hearings, and where final order of **board** amended findings of hearing officer in detail. M.C.L.A. § 24.281.

[8] Constitutional Law 287.1

92k287.1 Most Cited Cases

Constitutional due process did **not** require that "proof beyond a reasonable doubt" standard be applied in **license** revocation proceeding. <u>U.S.C.A.</u> Const.Amend. 14.

**585 *548 Carl Ziemba, Detroit, for petitioner-appellant.

Frank J. Kelley, Atty. Gen., Louis J. Caruso, Solicitor Gen., Thomas L. Sparks, Asst. Atty. Gen., for respondent-appellee.

Before T.M. BURNS, P.J., and BEASLEY and PAJTAS, [FN*] JJ.

<u>FN*</u> Richard M. Pajtas, 33rd Judicial Circuit Judge, sitting on Court of Appeals by assignment pursuant to <u>Const. 1963</u>, Art. 6, Sec. 23, as amended 1968.

BEASLEY, Judge.

Petitioner-appellant, Chelliah Thangavelu, M.D. appeals from an order of the Wayne County Circuit Court which affirmed revocation of his license to practice medicine by the State Board of Medicine and Department of Licensing and Regulation. The revocation proceeding was started on October 19, 1977, by the Attorney General as a result of two incidents involving appellant and two married women who were his patients. The complaint alleged violations of § 11(1), (2)(h) and (i), and § 12(1) of the Medical Practice Act, which provide:

"Sec. 11. (1) * * * the board may revoke, suspend, place on probation, or reprimand the holder of a license or an **586 approval to supervise a physician's assistant, or refuse to issue, renew, reregister, or reinstate a license or approval for unprofessional conduct.

- "(2) * * * 'unprofessional and dishonest conduct' means any of the following: * * *
- "(h) Lacking good moral character. * * *
- "(i) A departure from, or the failure to conform to, minimal standards of acceptable and prevailing medical practice, whether or not actual injury to a

patient is established. * * *

"Sec. 12. (1) "The board may revoke or suspend the *549 license of a licensee who is convicted of a felony or misdemeanor in the course of his practice." [FN1]

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FN1. 1973 P.A. 185, as amended; M.C.L. § 338.1811 and 338.1812; M.S.A. § § 14.542(11) and (12). The act has since been superseded by the Public Health Code, 1978 P.A. 368, as amended; M.C.L. § 333.1101 et seq.; M.S.A. § 14.15(1101) et seq.

Petitioner's license was revoked based on violations of § 11(1), (2)(h) and (i).

These administrative proceedings were held in abeyance due to a pending criminal action as a result of the complaint of one of the women, after which petitioner was convicted by a jury of criminal sexual conduct in the first degree. However, in *People v. Thangavelu*, [FN2] this conviction was set aside by this Court and the case remanded for a new trial in which a jury returned a verdict of not guilty.

FN2. 96 Mich.App. 442, 292 N.W.2d 227 (1980), *lv. den.* 410 Mich. 865 (1980).

The administrative hearing resumed on February 25, 1983, at which time petitioner's motion to dismiss the portion of the complaint regarding the woman who had brought the criminal complaint based on a theory of collateral estoppel was denied on the ground that collateral estoppel did not apply to this case.

The hearing officer hearing the complaint made full findings of fact and law supporting the conclusion to revoke petitioner's license. Upon appeal, petitioner raises six issues.

[1][2] First, petitioner claims that the board's decision in regard to the Forsman complaint was not supported by competent, material and substantial evidence on the whole record. With regard to the Forsman complaint, the hearing officer chose to believe the complaining woman who testified that petitioner touched her clitoris with his tongue because she saw him with his head directly over *550 her vaginal area and felt the sensation of his tongue touching her, and because petitioner admitted that he made an inspection of her pubic hair. There was ample testimony upon which the hearing officer could base his findings. The applicable appellate standard to be applied in reviewing the findings of

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fact made by the hearing officer is whether they are supported by competent, material and substantial evidence on the whole record. [FN3] Such competent, material and substantial evidence was present.

FN3. MERC v. Detroit Symphony Orchestra, Inc. 393 Mich. 116, 223 N.W.2d 283 (1974); Ann Arbor Bank & Trust Co. v. Comm'r of the Financial Institutions Bureau, 85 Mich. App. 131, 270 N.W.2d 725 (1978), lv. den. 405 Mich. 832 (1979).

Second, petitioner claims that the board's decision with regard to the May complaint was not supported by competent, material and substantial evidence on the whole record. Complainant testified that appellant diagnosed her as having hemorrhoids and treated them by inserting his finger in her rectum and massaging her rectum for twenty minutes. hearing officer found that the act did occur and continued for "at least ten minutes". This complainant was examined by another doctor (Dr. Penn), who testified on deposition that Mrs. May did not have hemorrhoids, nor a cyst, nor was she He also testified that a massage of her rectal area would be of no benefit whatsoever if she had hemorrhoids and, in fact, would result in a considerable amount of discomfort.

[3] Petitioner claimed that this complainant had failed a polygraph test and **587 that, as a result, no criminal complaint was issued. The hearing officer exercised his discretion and refused to admit the polygraph evidence.

The issue of whether the results of polygraph examinations should be admitted into evidence at *551 administrative hearings has not been uniformly decided in Michigan. In general, the decisions have held against admissibility of polygraph evidence at trial, both civil and criminal. [FN4]

<u>FN4. People v. Barbara</u>, 400 Mich. 352, 364, 255 N.W.2d 171 (1977); <u>People v. Frechett</u>, 380 Mich. 64, 68, 155 N.W.2d 830 (1968); <u>Stone v. Earp</u>, 331 Mich. 606, 50 N.W.2d 172 (1951).

In Sponick v. Detroit Police Dep't, [FN5] while intimating that polygraph evidence is inadmissible in administrative hearings, we held that, even if admitted, it does not have to be accepted as conclusive evidence.

<u>FN5.</u> 49 Mich.App. 162, 190-191, 211 N.W.2d 674 (1973).

In *People v. Barbara*, [FN6] the Supreme Court stated that although a polygraph is occasionally used as an investigative tool by prosecutors, the differences between use as an investigative and as an evidentiary device are great, and a technique accepted for one limited purpose may not yet be suitable for use in the other.

<u>FN6.</u> <u>Barbara, supra, 400 Mich. p. 403, 255</u> N.W.2d 171.

In MSEA v. Civil Service Comm, FN7 petitioner, an intake worker, was discharged from the Department of Social Services for misconduct constituting a crime. Evidence that a complaining witness had taken and passed a polygraph examination was admitted into evidence by the hearing officer. While finding it unnecessary to address the issue of whether such evidence is properly admissible in administrative hearings, we stated that results of polygraph examinations are normally not admissible.

FN7. 126 Mich.App. 797, 805, 338 N.W.2d 220 (1983), *lv. den.* 419 Mich. 958 (1984).

Finally, in Gilliard v. Dep't of Social Services, [FN8] where the DSS argued that the arbitrator in an administrative hearing committed error by excluding *552 evidence of a polygraph examination taken by one of their witnesses, we stated:

<u>FN8.</u> 135 Mich.App. 579, 585; 354 N.W.2d 263 (1982).

"We disagree. Subject to one carefully drawn exception (which is inapplicable to the case at bar), Michigan courts have consistently held that the results of polygraph examinations are inadmissible. See, e.g., <u>People v. Liddell</u>, 63 Mich App 491; 234 NW2d 669 (1975)." (Footnote omitted.)

[4] In the within case, the hearing officer declined to allow Mrs. May's polygraphs into evidence, but permitted a separate record. Even if we were to assume that the polygraph evidence was admissible, it is clear that the results of a polygraph examination are not conclusive. [FN9] We do not believe that the hearing officer abused his discretion by refusing to admit into evidence the results of polygraph examinations administered to Mrs. May. In addition, we do not believe that admitting the polygraph test into evidence would have changed the result.

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> <u>FN9.</u> See <u>People v. Barbara, supra;</u> Sponick, supra.

[5] Next, petitioner claimed that he was placed in double jeopardy as a result of the hearing officer's refusal to apply the principle of collateral estoppel to bar the administrative proceeding on the Forsman complaint. Petitioner reasons that the jury acquittal in his second trial for criminal sexual conduct constituted a finding that he had not committed an act of cunnilingus upon the complainant. He says that this jury verdict operated to apply the doctrine of collateral estoppel in this case where the medical licensing board attempted to use this same act of cunnilingus as part of the grounds for revocation of petitioner's medical license. The medical licensing board says flatly that the doctrine of collateral estoppel does not apply *553 to a revocation of license proceeding where the licensee has **588 been acquitted of the same criminal charge upon which the revocation is based.

In holding that the doctrine of collateral estoppel was **not** applicable, the hearing officer said:

"The issue decided in the **criminal** case dealt with a determination of whether Respondent violated a criminal statute, while the issue to be decided in the case at bar is a determination of whether Respondent had violated the licensing statute. The types of proof necessitated by the state in establishing its case is totally different since in the licensing statute a finding is made as to whether Respondent diverged from any of the requirements of the licensing statute or did certain acts which would permit the Board to take action against his license. The fact that Respondent was acquitted in the criminal trial is not dispositive of the issue of his licensing status. Even if Karen Forsman's testimony did not establish that Respondent was 'guilty beyond a reasonable doubt,' the same testimony may be taken in the licensing proceeding since the issue is different and the standard of proof is by a 'preponderance of the evidence'."

Finding that an administrative proceeding is **not criminal** in nature, "though the result of such a hearing can be devastating to the petitioner", the trial judge agreed with the hearing officer.

The complaint in this case alleged violations of § 11(1), (2)(h) and (2)(i), and § 12(1) of the Medical Practice Act, while the criminal statutes which plaintiff was found not guilty of violating in the criminal trial were M.C.L. § 750.520(a)-(e); M.S.A.

§ 28.788(1)-(5).

The double jeopardy clause found in the Fifth Amendment of the United States Constitution and in Article 1, § 15 of the 1963 Michigan Constitution protects against (1) a second prosecution for the same offense after acquittal; (2) a second prosecution *554 for the same offense after conviction; and (3) multiple punishments for the same offense. [FN10]

<u>FN10. People v. Baskin, 145 Mich.App. 526, 378 N.W.2d 535 (1985); People v. Robideau, 419 Mich. 458, 355 N.W.2d 592 (1984), citing North Carolina v. Pearce, 395 U.S. 711, 717, 89 S.Ct. 2072, 2076, 23 L.Ed.2d 656 (1969).</u>

In *People v. Watt*, [FN11] in discussing the doctrine of collateral estoppel when determining whether it applied to bar relitigation of issues previously decided by a hearing officer in subsequent criminal proceedings, we said:

FN11. 115 Mich.App. 172, 175, 320 N.W.2d 333 (1982), lv. den. 413 Mich. 926 (1982). See also, People v. Ward, 133 Mich.App. 344, 351 N.W.2d 208 (1984), lv. den. 422 Mich. 975 (1985); LaVergne v. Community Nat'l Bank of Pontiac, 132 Mich.App. 387, 347 N.W.2d 463 (1984); State ex rel. Macomb County Prosecuting Attorney v. Mesk, 123 Mich.App. 111, 333 N.W.2d 184 (1983), lv. den. 417 Mich. 1031 (1983).

"In <u>Topps-Toeller, Inc v Lansing [47 Mich App 720, 727; 209 NW2d 843 (1973)</u>], this Court defined collateral estoppel as follows:

" 'Collateral estoppel bars the relitigation of issues previously decided when such issues are raised in a subsequent suit by the same parties based upon a different cause of action.'

"In *Topps*, we cited <u>People ex rel Director of Conservation v Babcock</u> [38 MichApp 336, 346; 196 NW2d 489 (1972)], to describe collateral estoppel as follows:

"'When the subsequent action is based on a new cause of action, the prior litigation is conclusive only as to issues actually litigated. This is the doctrine of collateral estoppel.' (Citations omitted.)."

In Watt, where we reversed the defendant's conviction, we held that the doctrine of collateral estoppel permitted findings made at an administrative

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proceeding to be applied to a subsequent criminal proceeding on the same issue, reasoning that the burden of proof in the criminal case, guilt beyond a reasonable doubt, is greater than the preponderance of the evidence burden of proof in *555 the administrative hearing, and since the hearing officer's findings had been made under the lesser degree of proof, his decision was binding in the criminal **589 trial where the degree of proof was of a greater magnitude.

In contrast, in the within case, petitioner sought to use a prior favorable criminal disposition to preclude the Forsman complaint from the administrative proceedings. From *Watt* it may be argued that acquittal of criminal charges does not necessarily bar an administrative revocation proceeding based on the same issues, since a lesser degree of proof is utilized in the latter when making findings of fact.

In addition to the difference in the degrees of proof required, although the issues involved in the administrative hearing and the criminal proceeding may overlap, the purpose of a revocation proceeding substantially differs from a criminal proceeding. The hearing examiner discussed the remedial nature of revocation proceedings, stating:

"These two cases, when taken together, stand for the proposition that an administrative proceeding against a licensee is a different cause of action than a criminal proceeding against the same licensee, even if based on the same facts which resulted in acquittal of license in the criminal case. This is apparent when the statutes in question are compared since the licensing statute is for the protection of the public at large. As the Appellate Court of Illinois stated in Kaplan v Dept. of Registration & Education [46 III App 3d 968, 5 Ill.Dec. 303], 361 NE2d 626, 631 (1977): '... The practice of medicine, in addition to skill and knowledge, requires honesty and integrity of the highest degree, and inherent in the State's power is the right to revoke the license of those who violate the standards it sets.' This revocation proceeding is not a second criminal proceeding placing the physician in double jeopardy. Rather, the purpose is to maintain sound, professional standards of conduct for the purpose *556 of protecting the public and the standing of the medical profession in the eye of the public." [FN12]

FN12. Younge v. State Board of Registration for Healing Arts, 451 S.W.2d 346 (Mo.1969), cert. den. 397 U.S. 922, 90 S.Ct. 910, 25 L.Ed.2d 102 (1970); Helvering v.

<u>Mitchell</u>, 303 U.S. 391, 58 S.Ct. 630, 82 L.Ed. 917 (1937).

[6] We find no error in refusing to apply the doctrine of collateral estoppel in this case.

[7] Petitioner next claims that he was denied due process by the board's review of the record. He contends that only two hearing officers heard testimony in this case and that the final order of the board did not indicate that a majority of the members of the board actually read the record in reaching their decision. Thus, he claims that further proceedings were required under § 81 of the Administrative Procedures Act of 1969, which provides:

"When the official or a majority of the officials of the agency who are to make a final decision have not heard a contested case or read the record, the decision, if adverse to a party to the proceeding other than the agency itself, shall not be made until a proposal for decision is served on the parties, and an opportunity is given to each party adversely affected to file exceptions and present written arguments to the officials who are to make the decision. Oral argument may be permitted with consent of the agency."

M.C.L. § 24.281(1);
M.S.A. § 3.560(181)(1).

We believe petitioner's claim is wholly without merit. [FN13] The final order of the board states that the board reviewed the record made at the administrative hearings. In addition, the final order of the board amended the findings of the hearing officer in detail. Therefore, we conclude that the record *557 adequately indicates that a majority of the members of the board read the administrative record as required by the statute, and no further proceedings were required under M.C.L. § 24.281; M.S.A. § 3.560(181).

<u>FN13.</u> See <u>Dehart v. Board of Registration</u> in <u>Podiatry</u>, 97 Mich.App. 307, 316, 293 N.W.2d 806 (1980).

**590 [8] Last, petitioner claims that constitutional due process requires that the "beyond a reasonable doubt" standard be applied in license revocation hearings. <u>MSEA v. Civil Service Comm, supra</u>, and Rucker v. Board of Medicine, [FN14] hold otherwise. We are not persuaded that a change is desirable.

FN14. 138 Mich.App. 209, 360 N.W.2d 154 (1984).

Affirmed.

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ATTACHMENT C

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Supreme Judicial Court of Massachusetts, Suffolk. Alexander T. ARTHURS

V.

BOARD OF REGISTRATION IN MEDICINE.

Argued Dec. 4, 1980. Decided April 3, 1981.

Physician appealed from decision of the Board of Registration in Medicine revoking his license to practice medicine. The Supreme Judicial Court, Suffolk County, Abrams, J., held that: (1) findings supported conclusion by the Board that physician prescribed controlled substances for other than a legitimate medical purpose, that physician prescribed controlled substances not in the usual course of his medical practice, and acted other than for a legitimate medical purpose; (2) fact that conduct of physician giving rise to charges that he prescribed controlled substances for other than a legitimate purpose took place prior to case upon which Board relied in making its decision did not render the disciplinary proceedings violative of the ex post facto doctrine; (3) statement of reasons set forth in hearing officer's recommended decision, which were adopted by the Board of Registration in Medicine, satisfied statutory requirement that every agency decision be accompanied by a statement of reasons for the decision; and (4) double jeopardy did not prevent Board from revoking physician's license to practice medicine, despite fact that he was acquitted of criminal charges relating to the same conduct.

Remanded with directions to enter judgment affirming decision of the **Board** of Registration in Medicine.

West Headnotes

[1] Administrative Law and Procedure 791 15Ak791 Most Cited Cases

In reviewing the decision of an administrative agency, the Supreme Judicial Court, under the substantial evidence standard, must consider the entire record, and must take into account whatever in the record detracts from the weight of the agency's opinion, but as long as there is substantial evidence to support the findings of the agency, the Court will not substitute its views as to the facts. M.G.L.A. c. 30A, § § 1(6), 14(7)(e).

[2] Health @ 218

198Hk218 Most Cited Cases

(Formerly 299k11.3(3) Physicians and Surgeons)

While the Board of Registration in Medicine is free to evaluate evidence in light of its expertise, it cannot use its expertise as a substitute for evidence in the record.

[3] Health \$\infty\$ 218

198Hk218 Most Cited Cases

(Formerly 299k11.3(5) Physicians and Surgeons)

[3] Health © 223(1)

198Hk223(1) Most Cited Cases

(Formerly 299k11.3(5) Physicians and Surgeons)

Issue of whether physician conducted a physical examination of patient was not relevant in proceeding before the Board of Registration in Medicine for revocation of physician's license to practice medicine for prescribing controlled substances for other than a legitimate medical purpose, and therefore failure of hearing officer to make a finding concerning the credibility of either physician or patient on the issue did not require reversal of the Board's decision to revoke physician's license. M.G.L.A. c. 94C, § 19(a).

[4] Health \$\infty\$ 211

198Hk211 Most Cited Cases

(Formerly 299k11.2 Physicians and Surgeons)

Findings in proceeding before the Board of Registration in Medicine to revoke physician's license to practice medicine, that prescriptions for controlled substances were not recorded or were recorded on the wrong patient card, and that the quantity of drugs prescribed at short intervals to patients were in excess of physician's specific directions to take one tablet daily, supported conclusion by the Board that physician prescribed controlled substances for other than a legitimate medical purpose, that physician prescribed controlled substances not in the usual course of his medical practice, and acted other than for a legitimate medical purpose. M.G.L.A. c. 94C, § 19(a).

[5] Health \$\infty\$ 218

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198Hk218 Most Cited Cases

(Formerly 299k11.3(5) Physicians and Surgeons)

[5] Health © 223(1)

198Hk223(1) Most Cited Cases

(Formerly 299k11.3(5) Physicians and Surgeons)

In absence of substantial evidence in the record to support findings of the Board of Registration in Medicine that physician's record keeping and certain of his medical practices were deficient in some respects, Supreme Judicial Court could not consider them, despite fact that most of the members of the Board were experts, as the Board could not use its expertise as a substitute for evidence in the record.

[6] Health @ 218

198Hk218 Most Cited Cases

(Formerly 299k11.3(5) Physicians and Surgeons)

[6] Health \$\infty\$ 223(1)

198Hk223(1) Most Cited Cases

(Formerly 299k11.3(5) Physicians and Surgeons)

Although the Board of Registration in Medicine may introduce technical or specialized facts in the record through expert witnesses, or by taking official notice of facts, it must make certain that sufficient evidence is in the record for a court to review the evidence on which it relies. M.G.L.A. c. 30A, § 11(5).

[7] Administrative Law and Procedure 781 15Ak781 Most Cited Cases

Determinations as to the effect of conduct is essentially a matter of drawing inferences, and an agency's conclusions based on inferences will not be set aside by a reviewing court unless they are unreasonable.

[8] Administrative Law and Procedure 441 15Ak441 Most Cited Cases

An agency may adopt policies through adjudication as well as through rule making.

[9] Administrative Law and Procedure 496 15Ak496 Most Cited Cases

Policies announced in adjudicatory proceedings may serve as precedents for future cases.

[10] Administrative Law and Procedure 441

15Ak441 Most Cited Cases

Choice made between proceeding by general rule or

by individual, ad hoc litigation is one that lies primarily in the informed discretion of the administrative agency.

[11] Administrative Law and Procedure 441

15Ak441 Most Cited Cases

Agencies intending to fill in the details or clear up an ambiguity of an established policy may issue interpretation or informational pronouncements without going through the procedures required for the promulgation of a regulation.

[12] Licenses \$\infty\$ 38

238k38 Most Cited Cases

It is not inappropriate, much less erroneous, for an agency to use an ad hoc method of adjudication in disciplinary cases arising out of a criminal statute which is interpreted on an ad hoc basis by the courts.

[13] Constitutional Law 197

92k197 Most Cited Cases

Disciplinary proceedings fall outside the scope of the ex post facto doctrine.

[14] Constitutional Law \$\infty\$ 197

92k197 Most Cited Cases

Fact that conduct of physician giving rise to charges that he prescribed controlled substances for other than a legitimate purpose took place prior to decision upon which **Board** of Registration in Medicine relied in making its decision did not render such disciplinary proceedings violative of ex post facto doctrine, in light of facts that disciplinary proceedings fall outside the scope of the doctrine, and as physician's conduct was criminal under statute which was in effect prior to the conduct, so that the Board did not impose any new substantive liability on physician. M.G.L.A. c. 94C, § 19(a).

[15] Health @ 219

198Hk219 Most Cited Cases

(Formerly 299k11.3(4) Physicians and Surgeons)

While the Board of Registration in Medicine is required to afford parties adversely affected by a recommended decision of a hearing officer the opportunity to file objections to that decision, nothing in regulations governing the Board's adjudicatory hearings requires it to respond specifically to those objections. M.G.L.A. c. 30A, § 11(7)(b).

[16] Health 221

198Hk221 Most Cited Cases

(Formerly 299k11.3(4) Physicians and 383 Mass. 299, 418 N.E.2d 1236, 22 A.L.R.4th 651 (Cite as: 383 Mass. 299, 418 N.E.2d 1236)

Surgeons)

Statement of reasons set forth in hearing officer's recommended decision, which the Board of Registration in Medicine adopted in its entirety in proceedings to revoke physician's license to practice medicine for prescribing controlled substances for other than a legitimate medical purpose, satisfied statutory requirement that every agency decision be accompanied by a statement of reasons for the decision, and therefore the Board was not required to specifically rebut physician's objections to the hearing officer's recommended decision. M.G.L.A. c. 30A, § 11(8).

[17] Administrative Law and Procedure 511 15Ak511 Most Cited Cases

Agency officials who are to render a final decision are not required by the state Administrative Procedure Act to review the hearing transcript before ruling on objections to a proposed decision. M.G.L.A. c. 30A, § 11(7).

[18] Constitutional Law 287.2(5) 92k287.2(5) Most Cited Cases

[18] Health © 223(1)

198Hk223(1) Most Cited Cases

(Formerly 299k11.3(5) Physicians and Surgeons)

[18] Health © 223(2)

198Hk223(2) Most Cited Cases

(Formerly 299k11.3(5) Physicians and Surgeons)

Imposition of rule requiring Board of Registration in Medicine to review hearing transcript before ruling on objections to a proposed decision was not appropriate in proceeding to consider revocation of physician's medical license, as the Board is entitled to deference as to how it should proceed, as long as its actions are consistent with the requirements of due process and applicable statutes. <u>U.S.C.A.Const. Amend. 14</u>; <u>M.G.L.A. c. 30A, § § 1</u> et seq., <u>11(7)</u>.

[19] Double Jeopardy \$\infty\$24

135Hk24 Most Cited Cases

(Formerly 110k163)

Double jeopardy did **not** prevent **Board** of Registration in Medicine from revoking **physician's license** to practice medicine for prescribing controlled substances for other than a legitimate medical purpose, despite fact that he was either **acquitted** of **criminal charges** relating to the same conduct, or the indictments were dismissed, as the

purpose of discipline is **not** retribution but the protection of the plaintiff. <u>U.S.C.A.Const. Amends.</u> 5, 14.

[20] Health \$\infty\$211

198Hk211 Most Cited Cases

(Formerly 299k11.2 Physicians and Surgeons)

Even assuming entrapment is a defense in a proceeding to revoke a physician's license, record refuted contention by physician that he was entrapped by undercover police officer into prescribing him controlled substances for other than a legitimate medical purpose, as there were no lengthy negotiations between physician and the police officer, and no evidence that the government went beyond a simple request and pleaded or argued with physician. M.G.L.A. c. 94C, § 19(a).

[21] Criminal Law 37(3)

110k37(3) Most Cited Cases

To show entrapment, a defendant must show some evidence of government inducement, and mere evidence of solicitation is not enough to show such inducement.

**1239 *300 David Berman, Medford, for plaintiff.

Paul W. Johnson, Asst. Atty. Gen. (Carolyn V. Wood, Asst. Atty. Gen., with him), for defendant.

Before *299 HENNESSEY, C. J., BRAUCHER, KAPLAN, WILKINS and ABRAMS, JJ.

*300 ABRAMS, Justice.

The plaintiff Alexander T. Arthurs, a **physician licensed** by the Commonwealth, seeks judicial review of the decision of the **Board** of Registration in Medicine (**board**), revoking his **license** to practice medicine in the Commonwealth of Massachusetts. The **board** found that Arthurs prescribed controlled substances for other than a legitimate medical purpose, in violation of <u>G.L. c. 94C, s 19(a)</u>.

The plaintiff claims that (1) the **board's** decision is unsupported by substantial evidence; (2) the **board** erred by basing its decision on one of its adjudicatory opinions decided after Arthurs's conduct had occurred; (3) the **board** erred in its treatment of Arthurs's objections to the recommended decision of a hearing officer; (4) the doctrine of double jeopardy bars the **board's** disciplinary proceeding on the ground that Arthurs was **acquitted** in the Superior Court of **charges** growing out of the same conduct; and (5) that the disciplinary proceedings are barred

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on the ground of entrapment. We conclude that the decision of the **board** should be upheld.

*301 On October 1, 1976, the board issued an order to show cause, [FN1] pursuant to G.L. c. 112, s 5,[FN2] charging Arthurs with issuing **1240 prescriptions for controlled substances for other than a legitimate medical purpose, in violation of G.L. c. 94C, s 19(a).[FN3] Arthurs moved for specification of the charges, and the board detailed its allegations against him in a document entitled "Further Specifications." In essence, the board charged Arthurs with unlawfully prescribing controlled substances for five persons on fifty-six occasions. Arthurs then challenged the right of the board to deny him a continuance of the disciplinary proceedings during the pendency of criminal charges against him arising from some of the same conduct. [FN4] After those proceedings *302 terminated in the board's favor, the board held a hearing on its charges. In a "Recommended Decision," the hearing officer, [FN5] who conducted that hearing,[FN6] found that Arthurs had prescribed controlled substances for other than a legitimate medical purpose for three persons on numerous occasions.[FN7] The hearing officer concluded that in the prescribing of controlled substances, Arthurs failed to meet the minimum standards of proper medical practice suggested in a 1978 opinion by the board. Matter of Arthur E. Baer, M. D., Adjudicatory Case No. 205 (July 14, 1978).

> FN1. Section 1.01:(2) of the rules of procedure governing the board's disciplinary proceedings defines an "Order to show cause" as: "a paper served by the Board upon a registrant ordering the person to appear before the Board for an adjudicatory proceeding." 243 Code Mass.Regs. 1.01: (2) (1979). The board's regulations governing disciplinary proceedings are currently codified at 243 Code Mass.Regs. 1.00 et seq. (1979). They were previously printed, with different numeration, at Mass.Reg. issue No. 12, at 18-33 (1976). We will refer to the regulations as currently codified, which are in substance the same as the earlier version.

> FN2. General Laws c. 112, s 5, as amended through St. 1980, c. 213, provides: "The board may, after a hearing pursuant to chapter thirty A, revoke ... the certificate of registration ... (of) a physician ... upon proof satisfactory to a majority of the board that

said physician: ... (b) is guilty of an offense against any provision of the laws of the commonwealth relating to the practice of medicine, or any rule or regulation adopted thereunder." Although G.L. c. 112, s 5(b), was enacted after Arthurs's conduct occurred, that section merely repeats G.L. c. 112, s 61, which provides that "each board of registration ... after a hearing, may, by a majority vote of the whole board, suspend, revoke. or cancel any certificate, registration, license or authority issued by it, if it appears to the board that the holder ... is guilty ... of any offense against the laws of the commonwealth." Arthurs correctly does not claim any error in the citation of G.L. c. 112, s 5.

FN3. General Laws c. 94C is the Controlled Substances Act. Section 19(a), as amended through St. 1972, c. 806, s 15, provides, in pertinent part: "A prescription for a controlled substance to be valid shall be issued for a legitimate medical purpose by a practitioner acting in the usual course of his professional practice."

FN4. Arthurs requested a continuance of proceedings until the conclusion of criminal cases pending in Middlesex Superior Court arising from some of the same facts. That motion was denied at a hearing on November 18, 1976, on the ground that G.L. c. 112, s 63, specifically requires the board to go forward with administrative charges regardless of the pendency of criminal charges. Arthurs then challenged the constitutionality of G.L. c. 112, s 63, in the United States District Court for the District of Massachusetts. By order dated February 1, 1977, and opinion dated March 3, 1977, the court declared G.L. c. 112, s 63, unconstitutional and enjoined the hearing officer from further reliance on it. Arthurs v. Stern, 427 F.Supp. 425 (D.Mass.1977). On August 16, 1977, the United States Court of Appeals for the First Circuit reversed the judgment of the District Court and permitted the administrative proceeding to resume.

FN5. See G.L. c. 7, s 4H, as amended through St. 1980, c. 579, s 60, which

Arthurs v. Stern, 560 F.2d 477 (1st Cir.

1977), cert. denied, 434 U.S. 1034, 98 S.Ct.

768, 54 L.Ed.2d 782 (1978).

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establishes the Division of Hearings Officers in the Executive Office for Administration and Finance. Any "agency of the commonwealth authorized to conduct adjudicatory proceedings ... may ... request the division to conduct ... such proceedings ... on behalf of ... (the) agency." Hearing officers must "be members of the bar of the Commonwealth and ... shall have had trial experience."

<u>FN6.</u> The regulations governing the disciplinary proceedings of the board provide that all hearings shall be conducted by the board, "or a hearing officer designated by it." <u>243 Code Mass.Regs.</u> 1.04: (7) (1979).

<u>FN7</u>. The hearing officer recommended that the board dismiss the remaining charges against Arthurs. Since the board's final order adopted the recommended decision as the basis for its decision, those charges are deemed dismissed.

After Arthurs made written and oral objections [FN8] to the recommended decision, the board issued a final order revoking *303 Arthurs's certificate of registration to practice medicine Commonwealth of Massachusetts. The board stated that "(a)fter full consideration of the record and the exhibits, the Board adopts the Recommended Decision as the basis of its decision." **1241[FN9] It further stated that "(o)n the basis of the findings of fact enumerated in the Recommended Decision, and for reasons similar to those set forth in detail in In the Matter of Arthur E. Baer, M. D., ... the defendant did prescribe controlled substances for other than a legitimate medical purpose."

> FN8. In his brief to the hearing officer, Arthurs claimed that as to one patient, an the disciplinary undercover officer. proceedings were (1) not supported by substantial evidence and (2) barred because he was entrapped by the officer. Arthurs claimed that the disciplinary proceedings in their entirety were barred by principles of double jeopardy. Arthurs made a number of additional claims in his objections to the recommended decision. He claimed that many of the hearing officer's conclusions related to charges never specifically made, namely that Arthurs failed to maintain adequate records, that he issued

prescriptions at less than proper intervals, that he failed to question patients closely before issuing prescriptions for controlled substances, that he failed to schedule return office visits for his patients, and that he failed to take adequate note of the addresses of his patients. Arthurs also argued that the hearing officer's conclusions on these points were unsupported by substantial evidence.

<u>FN9.</u> Hereinafter, we shall refer to the decision as the board's decision since it is that decision which is subject to judicial review.

The specific findings made by the board are that: (1) Arthurs issued, without explanation, repeated refill prescriptions for controlled substances over relatively short periods of time; (2) Arthurs failed to exercise minimum care in preventing persons from obtaining multiple prescriptions from him for controlled substances under different pseudonyms; (3) Arthurs failed to exercise minimum care in obtaining and recording the addresses of patients for whom he was prescribing controlled substances over extended periods of time; and (4) Arthurs repeatedly failed to record an appropriate medical history, and to record an appropriate physical examination, in instances where controlled substances were prescribed.

The board concluded that "(f)rom the extensive evidence submitted, it is clear that (Arthur's) behavior was not an isolated incident or oversight, but a pattern of intentional or *304 negligent practice." [FN10] Arthurs then filed his complaint for judicial review. G.L. c. 112, s 64.[FN11]

FN10. In June, 1974, Arthurs was tried and acquitted on a Federal indictment charging him with prescribing Desoxyn and Seconal not in the course of his professional practice. United States v. Arthurs, No. 74-23-M (D.Mass., June 19, 1974). The board found that Arthurs was on notice of the care required in prescribing controlled substances by a prior trial on similar charges.

FN11. On June 11, 1979, Arthurs filed a complaint in the Middlesex Superior Court seeking judicial review of the decision of the **board**. Although <u>G.L. c. 112, s 64</u>, provides for judicial review of the **board**'s decision in the Supreme Judicial Court, the **board** did **not** move to dismiss. See Mass.R.Civ.P. 12(b)(1) and (h)(3), 365 Mass. 754 (1974).

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Rather the **board** petitioned the single justice to transfer the action pursuant to <u>G.L.</u> <u>c. 211, s 4A</u>. By an order dated June 14, 1979, a single justice transferred the action. The **physician** then moved that the single justice stay the **board's** order; the **physician** similarly moved that the **board** stay its own order pending the completion of the proceeding for judicial review. The **board** allowed this motion on the ground that it was unable to provide a transcript of the administrative hearing; it stayed its disciplinary order until ten days after it would have filed its answer.

The **board** filed its answer to Arthur's complaint on July 28, 1980, incorporating the documentary record as well as the transcripts of the disciplinary proceeding. The parties then filed cross motions for summary judgment. After hearing argument on these cross motions, a single justice reserved and reported the case for decision of all issues by us. Upon Arthurs's motion, the board subsequently stayed its disciplinary order until fifteen days after the issuance of a rescript from this court.

[1][2] 1. The substantiality of the evidence. Arthurs claims that the decision of the board is unsupported by substantial evidence, and therefore must be set aside. G.L. c. 30A, s 14(7)(e). " 'Substantial evidence' means such evidence as a reasonable mind might accept as adequate to support a conclusion." G.L. c. 30A, s 1(6). Initially, we note the limited nature of our review under the substantial evidence standard. While we must consider the entire record, and must take into account whatever in the record detracts from the weight of the agency's opinion, Cohen v. Board of Registration in Pharmacy, 350 Mass. 246, 253, 214 N.E.2d 63 (1966), as long as there is substantial evidence to support the findings of the agency, we will not substitute our views as to the facts. *305Martin v. Director of the Div. of Employment Security, 347 Mass. 264, 197 N.E.2d 594 (1964). McCarthy v. Contributory Retirement Appeal Bd., 342 Mass. 45, 172 N.E.2d 120 (1961). There must, however, be substantial evidence in the record to support the findings of the board. While the board is free to evaluate evidence in light of its expertise, it cannot use its expertise as a substitute for evidence in the record. We are concerned with how the board arrived at its decision and with the evidence on which it relied.

We summarize the facts found by the board. A.

Charles Jackson and David Jackson. **1242[FN12] A black male weighing approximately 300 pounds and standing approximately six feet, three or four inches tall, established a patient relationship with Arthurs under the names Charles Jackson and David Jackson. On six days this patient visited Arthurs twice, once under each name, and received prescriptions for either Quaalude [FN13] or Desoxyn, both controlled substances. The board found as a fact that Jackson was "physically prominent" and that "it would be extremely difficult for him to pass himself under two different aliases to the same doctor." At the hearing, Arthurs conceded that Jackson was a distinctive looking individual. The board found that Arthurs "knew or should have known" that David and Charles Jackson were the same person.

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<u>FN12</u>. The person who used the names Charles Jackson and David Jackson was summoned by the board. He was unwilling to testify without his attorney present, and was dismissed to be recalled at a later time. Neither the board nor Arthurs recalled him.

EN13. The parties stipulated that "the descriptions of the drugs as found in the Physicians' Desk Reference would govern these proceedings." However, it is unclear from the record what the parties meant by "description." For example, Physicians' Desk Reference, in addition to the chemical description of Quaalude, the following comments appear: "Caution must be exercised in administering (Quaalude) to individuals known to be addiction-prone or those whose history suggests they may increase the dosage on their own initiative. Illicit use of the drug or abuse of the drug for nontherapeutic purposes may lead to severe psychological physical or dependence." PDR at 986 (1979). The board does not argue that this warning is included in the stipulation as to the description of the drugs; hence, we do not consider it. The PDR text contained warnings about the dangers of misuse of the other controlled substances prescribed by Arthurs.

*306 From the prescriptions and the patient cards in evidence, the board found that Arthurs had prescribed controlled substances on sixteen occasions for David Jackson, and on at least nine occasions for Charles Jackson. All these prescriptions directed the patients to take one tablet daily. The board calculated that over the ninety-two days covered by the first four

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prescriptions to Charles Jackson, Arthurs issued prescriptions that exceeded the one tablet daily dosage prescribed to that patient by thirty per cent; [FN14] over a period of 166 days, Arthurs issued prescriptions to David Jackson that exceeded the directed dosage by forty-five per cent.[FN15] Arthurs offered no explanation for the excess in the amount of controlled substances prescribed by him, or for his failure to identify a patient for whom he was prescribing controlled substances.[FN16]

<u>FN14.</u> Arthurs issued thirty unit Qualude prescriptions for Charles Jackson with directions to take one tablet daily, at intervals of 15, 27, 37, 14, 27, and 39 days.

FN15. Arthurs issued Qualude prescriptions to David Jackson with directions to take one tablet daily, at intervals of 15, 27, 29, 7, 17, 25, 34 and 11 days.

<u>FN16.</u> When asked if some of his black patients were obtaining prescriptions by using aliases, Arthurs said, "Black people, I just couldn't tell." The board, correctly, did not credit this feeble excuse.

The facts found by the board also indicate that Arthurs failed to record on a patient card four prescriptions for Quaalude, two for David Jackson and two for Charles Jackson. It also found that six prescriptions for controlled substances issued to David Jackson were recorded on Charles Jackson's patient card, and that a prescription for Quaalude for one Margaret Jackson was recorded on Charles Jackson's card.

The patient cards, the board found, showed that Arthurs recorded Charles Jackson's address on his first visit as 108 Pearl Street, Cambridge, and David Jackson's address as 108 Pearl Street, Somerville. The first visit of this patient under his two names occurred on two consecutive days. Arthurs used the two addresses interchangeably thereafter. *307 The board concluded that "(w)hile it is certainly possible to copy or remember part of an address incorrectly, the extended pattern of using 'Cambridge' and 'Somerville' interchangeably on the twenty-five prescriptions in evidence for 'Charles Jackson' and 'David Jackson' **1243 raises the question whether Dr. Arthurs here took minimal care to prevent the fraudulent use of controlled substances."

B. Gail Diamond. [FN17] Arthurs issued six

prescriptions for Quaalude to a patient known to Arthurs as Gail Diamond. Two of these prescriptions were not recorded on the patient card, and on at least one prescription Arthurs used a different address without making a notation of any change of address on the patient card.

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<u>FN17.</u> The hearing officer concluded that Gail Diamond was not the true name of Arthurs's patient but that Arthurs knew her as Gail Diamond. The board summoned that person but she declined to answer on advice of counsel, citing the privilege against self-incrimination.

Arthurs's prescriptions directed Diamond to take one tablet daily. Over the forty-nine days covered by the first five prescriptions, the board determined that Arthurs issued prescriptions which exceeded the one tablet daily dosage by 200%. The board concluded that there might be an explanation for one of the surplus prescriptions, [FN18] but not for the others.

FN18. The hearing officer found a notation on Diamond's patient card accompanying one prescription of Quaalude stating "(p)atient was upset (indecipherable) her pills." The hearing officer stated that even if that entry is read to mean that that prescription was a replacement, there was no explanation in the record of subsequent thirty unit prescriptions which were given three, ten and fourteen days following the "replacement" prescription. Arthurs issued prescriptions for Gail Diamond at intervals of only 16, 20, 3, 7, and 4 days.

[3] C. Thomas Price. Thomas Price [FN19] was the pseudonym used by a detective from the Massachusetts State Police Diversion Investigation Unit. On Price's first recorded visit, Arthurs prescribed Nembutal but did not indicate a quantity on the patient card. On Price's return visit, Arthurs *308 noted that "(p)atient works late as he is a bouncer in a bar room and when he gets home he can't fall asleep." There is no notation of a prescription on that date. Arthurs prescribed Nembutal at bedtime to Price on seven subsequent dates, all of which were noted on the patient card, the last with the notation "may repeat if needed." Arthurs also prescribed Quaalude for him on one occasion. Over the 125 days covered by six prescriptions issued to Price, the board calculated that the number of tablets prescribed exceeded the one tablet daily dosage directed by Arthurs by forty-four per 418 N.E.2d 1236 383 Mass. 299, 418 N.E.2d 1236, 22 A.L.R.4th 651 (Cite as: 383 Mass. 299, 418 N.E.2d 1236)

cent.[FN20] The patient card for Thomas Price does not show any record of any physical examination during any of his nine visits,[FN21] nor any mention of the patient's present condition after the first two visits; nevertheless, controlled substances were prescribed on all but the second visit.

<u>FN19.</u> Price's real name is Thomas Jackson. In order to avoid confusion with the patient who used the names Charles and David Jackson, we shall refer to this individual as Price.

<u>FN20.</u> After Price's original visit, he was issued Nembutal prescriptions at intervals of 26, 21, 18, 24, 13, and 21 days.

FN21. During the proceedings, testimony from Price that Arthurs had not conducted a physical examination of him was directly contradicted by Arthurs. The hearing officer did not make any finding concerning the credibility of either Price or Arthurs on this issue. The only finding concerning that testimony was that the results of a physical examination, if any, had not been recorded. A hearing officer who hears evidence in a contested adjudicatory proceeding should make credibility determinations whenever necessary, no matter how difficult. Since the issue of whether a physical examination was conducted is not particularly relevant to the board's primary concerns, the failure to make these determinations does not require reversal.

[4] The findings that prescriptions for controlled substances were not recorded, or were recorded on the wrong patient card, as well as the findings as to the quantity of drugs prescribed at short intervals to patients in excess of Arthurs's specific directions to take one tablet daily, all support the board's conclusion that Arthurs prescribed controlled substances for other than a legitimate medical purpose.[FN22] *309 "The issuing **1244 of additional prescriptions ... at short intervals ... could (be) found to be inconsistent with accepted medical treatment and support an inference that the prescriptions were not intended to serve a medical purpose." Commonwealth v. Comins, 371 Mass. 222, 233, 356 N.E.2d 241 (1976), cert. denied, 430 U.S. 946, 97 S.Ct. 1582, 51 L.Ed.2d 793 (1977). See United States v. Smurthwaite, 590 F.2d 889, 892 (10th Cir. 1979); United States v. Rosen, 582 F.2d 1032, 1036 (5th Cir. 1978); United States v. Bartee,

479 F.2d 484, 489 (10th Cir. 1973).

FN22. Our review of these findings does not require the use of specialized knowledge. It requires only an examination of the board's findings as to the dosage and frequency of Arthurs's prescriptions, the prescriptions Arthurs failed to record on his patient cards, and a review of the testimony concerning Arthurs's prescribing of controlled substances to David and Charles Jackson. See <u>supra at ----</u> (Mass.Adv.Sh. (1981) at ----). We view these as matters of common experience and common sense, not technical expertise.

The board also could find that Arthurs prescribed controlled substances not in the usual course of his medical practice and acted other than for a legitimate medical purpose "from evidence ... surrounding the facts and circumstances of the prescriptions " (emphasis supplied). <u>United States v. Rogers, 609 F.2d 834, 839 (5th Cir. 1980)</u>. See <u>United States v. Larson, 507 F.2d 385, 387 (9th Cir. 1974)</u>. We conclude that on the above facts and circumstances, the board's decision is amply supported by substantial evidence.

[5] We comment briefly on certain other findings of the board in its decision. The board also found that Arthurs's recordkeeping, and certain of his medical practices, were deficient in some respects. We cannot consider these findings because there is no substantial evidence in the record to support findings.[FN23] The board, however, argues that since most of the members of the board are experts, the board can use its expertise without the evidentiary basis of that expertise appearing in the record. "This startling theory, if recognized, would not only render absolute a finding opposed to uncontradicted testimony but would *310 render the right of appeal completely inefficacious as well. A board of experts, sitting in a quasi-judicial capacity, cannot be silent witnesses as well as judges." New Jersey Bd. of Optometrists v. Nemitz, 21 N.J.Super. 18, 28, 90 A.2d 740 (1952). The board may put its expertise to use in evaluating the complexities of technical evidence. However, the board may not use its expertise as a substitute for evidence in the record. "The requirement for administrative decisions based on substantial evidence and reasoned findings which alone make effective judicial review possible would become lost in the haze of so-called expertise (if material facts known to the agency did not appear in the record). Administrative expertise would then be

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on its way to becoming 'a monster which rules with no practical limits on its discretion.' "Baltimore & Ohio R. R. v. Aberdeen & Rockfish R. R., 393 U.S 87, 92, 89 S.Ct. 280, 283, 21 L.Ed.2d 219 (1968), quoting from Burlington Truck Lines, Inc. v. United States, 371 U.S. 156, 167, 83 S.Ct. 239, 245, 9 L.Ed.2d 207 (1962).

FN23. The board found that Arthurs failed to take an "appropriate" physical examination or an "appropriate" medical history of the three patients for whom he prescribed controlled substances; that he failed to schedule appropriate return visits for those patients; and that he prescribed drugs that were inappropriate for the only diagnoses he recorded for those patients.

[6] If an agency wishes to rely on a fact, that fact must be established by evidence in the record. An agency may introduce technical or specialized facts in the record through expert witnesses, or by taking official notice of facts. G.L. c. 30A, s 11(5). Whatever method it chooses, the board must make certain that sufficient evidence is in the record for a court to review the evidence on which the agency relies.

[7] As we read the board's decision, it concentrated on Arthurs's overprescribing, his failure properly to identify David and Charles Jackson, and the obvious mistakes in the patient cards concerning the prescriptions in evidence. The overall facts and circumstances established by substantial evidence permitted the board to conclude that Arthurs was not acting for a legitimate medical purpose in prescribing controlled substances. Determinations as to the effect of conduct is essentially a matter of drawing**1245 inferences, and an agency's conclusions based on inferences will not be set aside by a reviewing court unless they are unreasonable. We *311 conclude that the inferences drawn by the board in this case are reasonable and are supported by substantial evidence.

2. Reliance on the Baer decision. Arthurs challenges the revocation of his license on the ground that the hearing officer, and the board, took notice "of general, technical or scientific facts" without notifying him of the materials so noticed as required by <u>G.L. c. 30A, s 11(5).[FN24]</u> He also claims that the board is required to adopt such standards as it promulgated in Matter of Arthur E. Baer, M. D., Adjudicatory Case No. 205 (July 14, 1978), see note 25, infra, solely by rulemaking, and that it is not fair to judge Arthurs's conduct by criteria set forth in an

adjudicatory case determined after that conduct had occurred.

FN24. General Laws c. 30A, s 11(5), inserted by St. 1954, c. 681, s 1, provides: "Agencies may take notice of any fact which may be judicially noticed by the courts, and in addition, may take notice of general, technical or scientific facts within their specialized knowledge. Parties shall be notified of the material so noticed, and they shall be afforded an opportunity to contest the facts so noticed. Agencies may utilize their experience, technical competence, and specialized knowledge in the evaluation of the evidence presented to them."

In its decision, the board drew inferences from the findings of fact as to Arthurs's conduct. "(T)he Board is, as is any other trier of fact, accorded the power to draw reasonable inferences from the evidence before it." NLRB v. Milk Drivers & Dairy Employees, Local 338, 531 F.2d 1162, 1165 (2d Cir. 1976). "One of the purposes which lead to the creation of such boards is to have decisions based on evidential facts under the particular statute made by experienced officials with an adequate appreciation of the complexities of the subject which is entrusted to their administration." American Broadcasting Cos. v. Writers Guild of America, West, Inc., 437 U.S. 411, 433, 98 S.Ct. 2423, 2435, 57 L.Ed.2d 313 (1978), quoting from Republic Aviation Corp. v. NLRB, 324 U.S. 793, 800, 65 S.Ct. 982, 986, 89 L.Ed. 1372 (1945); Radio Officers' Union v. NLRB, 347 U.S. 17, 48-49, 74 S.Ct. 323, 339, 98 L.Ed. 455 (1954). The board's conclusion that Arthurs prescribed controlled substances for other than legitimate medical purposes is a reasonable and permissible inference from the evidence. See supra at 1242.[FNa] *312 The board based its holding on the Baer decision, which relies on case law, [FN25] not on expertise or technical knowledge. See note 22, supra. The inferences drawn from the evidence in this **1246 case were largely matters of common experience and common sense, not matters of specialized or technical knowledge.

FNa. Mass.Adv.Sh. (1981) at ----.

FN25. See Matter of Arthur E. Baer, M. D., Adjudicatory Case No. 205, at 15-16 (July 14, 1978). The factors Baer held to be relevant in making a determination that a physician had prescribed controlled substances without a legitimate medical purpose, and the cases from which those

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standards derive, include the following:

- "(i) the physician's permitting the patient to name the drug he desires; see Commonwealth v. Comins, 371 Mass. 222, 233, 356 N.E.2d 241 (1976), cert. denied, 430 U.S. 946, 97 S.Ct. 1582, 51 L.Ed.2d 793 (1977); United States v. Ellzey, 527 F.2d 1306 (6th Cir. 1976);
- "(ii) the physician's expressing concern as to how and where a prescription would be filled in a manner which does not indicate a good faith concern for his patient; see Commonwealth v. Comins, supra; Commonwealth v. Lozano, 5 Mass.App. 872, 367 N.E.2d 1186 (1977); Commonwealth v. Miller, 361 Mass. 644, 282 N.E.2d 394 (1972); United States v. Bartee, 479 F.2d 484 (10th Cir. 1973).
- "(iii) repeated refills over relatively short periods of time, Comins, supra; Commonwealth v. Lozano, supra; <u>United States v. Green, 511 F.2d 1062 (7th Cir.)</u> cert. denied, <u>423 U.S. 1031, 96 S.Ct. 561, 46 L.Ed.2d 404 (1975)</u>.
- "(iv) general remarks of the physician indicating his experience with non-therapeutic uses of the drugs and of drug enforcement actions and procedures; Comins, supra; Lozano, supra.
- "(v) failure to schedule appropriate appointments for return visits and other factors indicating a lack of interest in follow up care; Lozano, supra; <u>United States v. Moore</u>, 423 U.S. 122, 96 S.Ct. 335, 46 L.Ed.2d 333 (1975);
- "(vi) conversations and other circumstances which demonstrate that the physician knew that the drugs were not to be used for therapeutic or medical purposes; Miller, supra; Lozano, supra; United States v. Hooker, 541 F.2d 300 (1st Cir. 1976); United States v. Badia, 490 F.2d 296 (1st Cir. 1973)."

[8][9][10][11] Arthurs next argues that the board should have utilized rule-making rather than adjudication in establishing standards for determining when a physician unlawfully prescribes controlled substances. We disagree. It is a recognized principle of administrative law that an agency may adopt policies through adjudication as well as through *313 rule-making. SEC v. Chenery Corp., 332 U.S. 194, 201-203, 67 S.Ct. 1575, 1579-1580, 91 L.Ed. 1995 (1947). Accord, NLRB v. Bell Aerospace Co., 416 U.S. 267, 291- 294, 94 S.Ct. 1757, 1770, 40 L.Ed.2d

134 (1974); Maine Pub. Serv. Co. v. Federal Power Comm'n, 579 F.2d 659, 669 n.14 (1st Cir. 1978). Policies announced in adjudicatory proceedings may serve as precedents for future cases. See NLRB v. Wyman-Gordon Co., 394 U.S. 759, 766, 89 S.Ct. 1426, 1429, 22 L.Ed.2d 709 (1969); Michigan Wisconsin Pipe Line Co. v. Federal Power Comm'n, 520 F.2d 84, 89 (D.C. Cir. 1975). Further, "the choice made between proceeding by general rule or by individual, ad hoc litigation is one that lies primarily in the informed discretion of the administrative agency." SEC v. Chenery Corp., 332 U.S. 194, 203, 67 S.Ct. 1575, 1580, 91 L.Ed. 1995 (1947). NLRB v. Bell Aerospace Co., 416 U.S. 267, 294, 94 S.Ct. 1757, 1771, 40 L.Ed.2d 134 (1974).[FN26]

<u>FN26.</u> The agency's choice is not always limited to adjudication or rule-making. Agencies "intending to fill in the details or clear up an ambiguity of an established policy" may issue interpretation or informational pronouncements without going through the procedures required for the promulgation of a regulation. See <u>Massachusetts Gen. Hosp. v. Rate Setting Comm'n, 371 Mass. 705, 707, 359 N.E.2d 41 (1977).</u>

[12] We do not think it inappropriate, much less erroneous, for the agency to use an ad hoc method of adjudication in disciplinary cases arising out of a criminal statute which is interpreted on an ad hoc basis by the courts. "It is the merit of the common law that it decides the case first and determines the principle afterwards.... A well settled legal doctrine embodies the work of many minds, and has been tested in form as well as substance by trained critics whose practical interest it is to resist it at every step. These are advantages the want of which cannot be supplied by any faculty of generalization, however brilliant" Matter of Roche, --- Mass. ---, --n.16,[FNb] 411 N.E.2d 466 (1980), quoting Justice Wendell Holmes, Codes, And the Oliver Arrangement of the Law, 5 Am.L.Rev. 1 (1870).

FNb. Mass.Adv.Sh. (1980) 2203, 2218 n.16.

Since the board's decisions are public, see <u>243 Code Mass.Regs. 1.04</u>: (13) (1979),[FN27] the board is not at fault if persons *314 appearing before it are unaware of its decisions. Of course, it is helpful for the hearing officer to inform counsel of the opinions on which the hearing officer intends to rely. Arthurs had an opportunity [FN28] to argue that the inferences from the evidence of overprescribing, the

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failure to recognize a patient obtaining prescriptions under two names, and the failure to record prescriptions for controlled substances on patient cards, were not reasonable or, even if reasonable, should not be made by the board.

FN27. Section 1.04: (13) states, in pertinent part: "The Board shall prepare an official record of each adjudicatory hearing and maintain it for public inspection. The record will contain ... (e) Orders of the Board and the final decision of the Board with a statement of reasons."

FN28. See 243 Code Mass.Regs. 1.05: (4)(b) (1979), which provides that "(t)he Board shall afford an opportunity to each party adversely affected (by a proposed decision) to file objections and to present argument, either orally or in writing at the Board's discretion, to the Board members who are to render the final decision."

[13][14] Arthurs also contends that, since the conduct which gave rise to the charges against him took place prior to the Baer decision, any reliance on the Baer standards is barred as an ex post facto ruling. The short answer is that disciplinary proceedings fall outside the scope of the ex post facto doctrine. Hawker v. New York, 170 U.S. 189, 197, 18 S.Ct. 573, 576, 42 L.Ed. 1002 (1898). **1247Foster v. Police Comm'rs, 102 Cal. 483, 492, 37 P. 763 (1894). Furnish v. Board of Medical Examiners, 149 Cal. App.2d 326, 330-331, 308 P.2d 924 (1957). The Hawker court, holding that a State may bar a convicted felon from the practice of medicine by way of legislation enacted after the individual's conviction stated, "The State is not seeking to further punish a criminal, but only to protect its citizens from physicians of bad character." 170 U.S. at 196, 18 S.Ct. at 576. Such a law is, rather than ex post facto, simply "retrospective insofar as it determines from the past conduct of the party his fitness for the proposed business." Furnish, supra at 331, 308 P.2d 924, quoting from Foster, supra, at 492, 37 P. 763. Further, Arthurs's conduct was criminal under G.L. c. 94C, s 19(a), and that statute was in effect prior to the conduct which culminated in discipline. Thus the board did not impose any new substantive liabilities on Arthurs. *315Commonwealth v. Klein, 372 Mass. 823, 833, 363 N.E.2d 1313 (1977) (new standard of criminal conduct not applied retroactively because defendant not on notice of possible criminality of his conduct). See also Commonwealth v. Lewis, --- Mass. ---, ---

,[FNc] 409 N.E.2d 771 (1980).

FNc. Mass.Adv.Sh. (1980) 1973, 1980.

3. The board's denial of Arthurs's objections to the recommended decision. After the hearing officer filed the recommended decision with the board, the board notified Arthurs of his right to file objections to that decision. [FN29] Arthurs then filed written objections and made oral objections to the recommended decision. The board's final order, which adopted the recommended decision, noted Arthurs's objections, but did not specifically address or answer them.

FN29. General Laws c. 30A, s 11(7)(b), inserted by St. 1954, c. 681, s 1, provides: "(A)n opportunity is afforded each party adversely affected to file objections and to present argument, either orally or in writing as the agency may order, to a majority of the officials who are to render the final decision. The agency may by regulation provide that, unless parties make written request in advance for the tentative or proposed decision, the agency shall not be bound to comply with the procedures of this paragraph." See 243 Code Mass.Regs. 1.05: (4)(b)(1979),supra, at 1246 n.28 (Mass.Adv.Sh. (1981) at ---- n.28).

[15][16] Arthurs argues that the board erred by not providing an adequate statement of reasons for overruling his objections. We disagree. First, while the board is required to afford parties adversely affected by a recommended decision of a hearing officer the opportunity to file objections to the decision, see note 29, supra, nothing in the regulations governing the board's adjudicatory hearings requires the board to respond specifically to those objections. Second, while G.L. c. 30A, s 11(8),[FN30] requires every agency decision to be "accompanied by a statement of reasons for the decision," that requirement was satisfied in this case by the statement of reasons set forth in the hearing officer's recommended decision, which the board adopted in its entirety. General Laws c. 30A, s 11(8), does not specifically require *316 that objections to a recommended decision be answered or be accompanied by a statement of reasons, only that the agency's final decision be accompanied by the required statement of reasons. The board's failure to rebut Arthurs's objections specifically, therefore, is not error.

FN30. Section 11(8), inserted by St. 1954, c.

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681, s 1, provides in pertinent part: "Every agency decision shall be in writing or stated in the record. The decision shall be accompanied by a statement of reasons for the decision, including determination of each issue of fact or law necessary to the decision, unless the General Laws provide that the agency need not prepare such statement in the absence of a timely request to do so."

[17][18] Arthurs also argues that it was error for the board to have overruled those objections since the board did not have a copy of the hearing transcript when it made its ruling. The simple answer is that there is no requirement in the State Administrative Procedure Act that agency officials who are to render a final decision must review the transcript before ruling on objections to a proposed decision. Cf. G.L. c. 30A, s 11(7). Arthurs urges us to impose a rule of procedure on the board. The board **1248 is responsible to the public for the discipline of physicians who abuse their obligations and the responsibilities of their profession. Since the board must "provide itself with the flexibility it needed to investigate and to determine whether the public interest requires the revocation of a physician's license," Levy v. Board of Registration & Discipline in Medicine, --- Mass. ---, [FNd] 392 N.E.2d 1036 (1979), we defer to the board's determination as to how it should proceed as long as its actions are consistent with the requirements of due process and G.L. c. 30A. We decline to impose a rule on the board which might unduly hamper its effective functioning. See Grocery Mfrs. of America v. Dep't. of Pub. Health, --- Mass. ---, ---(1979) [FNe.]

FNd. Mass.Adv.Sh. (1979) 1857, 1865.

FNe. Mass. Adv. Sh. (1979) 2291, 2303.

[19] 4. Double Jeopardy. Arthurs argues that since he was acquitted in 1977 of charges relating to the issuance of prescriptions to Thomas Price (the undercover officer), and since the indictments as to Charles and David Jackson, and Gail Diamond were continued without a finding and then dismissed, see Commonwealth v. Brandano, 359 Mass. 332, 269 N.E.2d 84 (1971), the principle of double jeopardy bars the board from disciplining him. Arthurs claims that the disciplinary proceedings are punitive, and as such they are barred by the outcome of judicial proceedings. Arthurs argues that, since a person disciplined by a professional board is necessarily *317 humiliated and disgraced, disciplinary

proceedings are essentially a form of punishment. While Arthurs may be correct as to the effect of such a proceeding on a disciplined professional, the purpose of discipline is not retribution but the protection of the public. The board is mandated to police the medical profession, and to take appropriate disciplinary action against those members of the profession "who do not live up to the solemn nature of their public trust." Levy v. Board of Registration & Discipline in Medicine, --- Mass. ---, [FNf] 392 N.E.2d 1036 (1979). The fact that discipline is painful does not alter the board's responsibility to consider a physician's qualification to practice medicine. The board may make that determination even in cases where the physician prevails in a judicial proceeding. See Helvering v. Mitchell. 303 U.S. 391, 397, 58 S.Ct. 630, 632, 82 L.Ed. 917 (1938); United States v. Naftalin, 606 F.2d 809, 812 (8th Cir. 1979); Younge v. State Bd. of Registration for the Healing Arts, 451 S.W.2d 346 (Mo.Sup.1969), cert. denied, 397 U.S. 922, 90 S.Ct. 910, 25 L.Ed.2d 102 (1970); Strance v. New Mexico Bd. of Medical Examiners, 83 N.M. 15, 487 P.2d 1085 (1971).

FNf. Mass. Adv. Sh. (1979) 1857, 1869.

[20][21] 5. Entrapment. Arthurs argues that the conduct of Thomas Price, the Massachusetts State Police Diversion Unit undercover detective. constituted entrapment.[FN31] Even assuming entrapment is a defense in a delicensure proceeding, see Patty v. Board of Medical Examiners, 9 Cal.3d 356, 107 Cal.Rptr. 473, 508 P.2d 1121 (1973), the record does not support Arthurs's contention. To show entrapment, a defendant must show some evidence of government inducement, and "(m)ere evidence of solicitation is not enough to show inducement." Commonwealth v. Thompson, --- Mass. ---, ---, [FNg] 416 N.E.2d 497 (1981), quoting from Commonwealth v. Miller, 361 Mass. 644, 652, 282 N.E.2d 394 (1972). Here, there were no lengthy negotiations between Arthurs and Price, nor was there evidence that the government *318 "went beyond a simple request and pleaded or argued with the defendant." Commonwealth v. Thompson, supra at ---,[FNh] 416 N.E.2d 497, quoting from Commonwealth v. Miller, supra, 361 Mass. at 652, 282 N.E.2d 394 quoting from Kadis v. United States, 373 F.2d 370, 374 (1st Cir. 1967). Cf. United States v. Jannotti, 501 F.Supp. 1182, 1193-1203 (E.D.Pa.1980). Compare **1249Patty v. Board of Medical Examiners, 9 Cal.3d 356, 107 Cal.Rptr. 473, 508 P.2d 1121 (1973), with Kee Wong v. State Bar of Cal., 15 Cal.3d 528, 531, 125 Cal.Rptr. 482, 542 P.2d

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642 (1975).

<u>FN31.</u> In his brief, Arthurs concedes that as to Charles and David Jackson, or Gail Diamond, entrapment is not applicable. He asserts, however, that if we conclude there was entrapment by Price, the board should reconsider the remaining evidence to determine if the evidence is substantial and warrants the same sanction.

FNg. Mass.Adv.Sh. (1981) 209, 215.

FNh. Mass.Adv.Sh. (1981) at 215.

The action is remanded to the single justice with directions to enter a judgment affirming the decision of the board revoking Alexander T. Arthurs's license to practice medicine.

So ordered.

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